104TH CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPT. 104–203
Part 1

ANTITRUST CONSENT DECREE REFORM ACT OF 1995

JULY 24, 1995.—Ordered to be printed

Mr. HYDE, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 1528]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1528) to supersede the Modification of Final Judgment entered August 24, 1982, in the antitrust action styled *United States* v. *Western Electric*, Civil Action No. 82–0192, United States District Court for the District of Columbia, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Antitrust Consent Decree Reform Act of 1995".

SEC. 2. AUTHORIZATION FOR BELL OPERATING COMPANY TO ENTER COMPETITIVE LINES OF BUSINESS.

(a) APPLICATION.—

(1) IN GENERAL.—After the applicable date specified in paragraph (2), a Bell operating company may apply to the Attorney General for authorization, notwithstanding the Modification of Final Judgment—

(A) to provide interexchange telecommunications services,

(B) to manufacture or provide telecommunications equipment, or manufacture customer premises equipment, or

(C) to provide alarm monitoring services.

The application shall describe the nature and scope of the activity, and the product market, service market, and geographic market, for which authorization is sought.

(2) APPLICABLE DATES.—For purposes of paragraph (1), the applicable date after which a Bell operating company may apply for authorization shall be—

(A) the date of the enactment of this Act, with respect to—

(i) providing interexchange telecommunications services, and

(ii) manufacturing or providing telecommunications equipment, or manufacturing customer premises equipment, and

(B) the date that occurs 3 years after the date of the enactment of this Act, with respect to providing alarm monitoring services.

(3) PUBLICATION.—Not later than 10 days after receiving an application made under paragraph (1), the Attorney General shall publish the application in the Federal Register.

(4) AVAILABILITY OF INFORMATION.—The Attorney General shall make available to the public all information (excluding trade secrets and privileged or confidential commercial or financial information) submitted by the applicant in connection with the application.

(b) DETERMINATION BY THE ATTORNEY GENERAL.—

(1) COMMENT PERIOD.—Not later than 45 days after an application is published under subsection (a)(3), interested persons may submit written comments to the Attorney General, regarding the application. Submitted comments shall be available to the public.

(2) DETERMINATION.—(A) After the time for comment under paragraph (1) has expired, but not later than 180 days after receiving an application made under subsection (a)(1), the Attorney General shall issue a written determination, with respect to granting the authorization for which the Bell operating company has applied. If the Attorney General fails to issue such determination in the 180-day period beginning on the date the Attorney General receives such applica-

tion, the Attorney General shall be deemed to have issued a determination approving such application on the last day of such period.

(B) The Attorney General shall approve the granting of the authorization requested in the application unless the Attorney General finds that there is a dangerous probability that such company or its affiliates would successfully use market power to substantially impede competition in the market such company seeks to enter. The Attorney General may approve all or part of the requested authorization.

(C) A determination that approves any part of a requested authorization shall describe with particularity the nature and scope of the approved activity, and list each product market, service market, and geographic market, to which such approval applies.

(3) PUBLICATION.—Not later than 10 days after issuing a determination under paragraph (2), the Attorney General shall publish a brief description of the determination in the Federal Register.

(4) FINALITY.—A determination made under paragraph (2) shall be final unless a petition with respect to such determination is timely filed under subsection (c)(1).

(c) JUDICIAL REVIEW.—

(1) FILING OF PETITION.—(A) Not later than 30 days after a determination by the Attorney General is published under subsection (b)(3), the Bell operating company that applied to the Attorney General under subsection (a), or any person who would be injured in its business or property as a result of the determination regarding such company's engaging in the activity described in such company's application, may file a petition for judicial review of the determination in the United States Court of Appeals for the District of Columbia Circuit.

(B) The United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review determinations made under section 2(b)(2).

(2) CERTIFICATION OF RECORD.—As part of the answer to the petition, the Attorney General shall file in such court a certified copy of the record upon which the determination is based.

(3) CONSOLIDATION OF PETITIONS.—The court shall consolidate for judicial review all petitions filed under this subsection with respect to the application.

(4) JUDGMENT.—(A) The court shall enter a judgment after reviewing the determination in accordance with section 706 of title 5 of the United States Code. The determination required by subsection (b)(2)(B) shall be affirmed by the court only if the court finds that the record certified pursuant to paragraph (2) provides substantial evidence for that determination.

(B) A judgment—

(i) affirming any part of the determination that approves granting all or part of the requested authorization, or

(ii) reversing any part of the determination that denies all or part of the requested authorization,

shall describe with particularity the nature and scope of the activity, and each product market, service market, and geographic market, to which the affirmance or reversal applies.

SEC. 3. AUTHORIZATION AS PREREQUISITE.

(a) PREREQUISITE.—Until a Bell operating company is so authorized in accordance with section 2, it shall be unlawful for such company, directly or through an affiliate, to engage in an activity described in section 2(a)(1).

(b) GENERAL EXCEPTIONS.—Except with respect to providing alarm monitoring services, subsection (a) shall not prohibit a Bell operating company from engaging, at any time after the date of the enactment of this Act, in any activity as authorized by an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the Modification of Final Judgment, if—

(1) such order was entered on or before the date of the enactment of this Act, or

(2) a request for such authorization was pending before such court on the date of the enactment of this Act.

(c) EXCEPTION FOR CERTAIN ALARM MONITORING SERVICES.—Subsection (a) shall not prohibit a Bell operating company, at any time after the date of the enactment of this Act, from providing alarm monitoring services to the same extent that such company was already providing such services before such date.

(d) EXCEPTION FOR CERTAIN INTEREXCHANGE TELECOMMUNICATIONS SERVICES.—Subsection (a) shall not prohibit a Bell operating company, at any time after the date of the enactment of this Act, from providing interexchange telecommunications services with respect to telecommunications that originate in any exchange area in which such company is not the dominant provider of wireline telephone exchange service.

(e) EXCEPTIONS FOR INCIDENTAL SERVICES.—Subsection (a) shall not prohibit a Bell operating company, at any time after the date of the enactment of this Act, from providing interexchange telecommunications services for the purpose of—

(1)(A) providing audio programming, video programming, or other programming services to subscribers to such services of such company,

(B) providing the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services, or

(C) providing to distributors audio programming or video programming that such company owns, controls, or is licensed by the copyright owner of such programming, or by an assignee of such owner, to distribute,

(2) providing a telecommunications service, using the transmission facilities of a cable system that is an affiliate of such company, between exchange areas within a cable system franchise area in which such company is not, on the date of the enactment of this Act, a provider of wireline telephone exchange service,

(3) providing commercial mobile services in accordance with existing law,

(4) providing a service that permits a customer that is located in one exchange area to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another exchange area,

(5) providing signaling information used in connection with the provision of exchange services, or exchange access, to a local exchange carrier, or

(6) providing network control signaling information to, and receiving such signaling information from, interexchange carriers at any location within the area in which such company provides exchange services or exchange access.

SEC. 4. REGULATION OF ELECTRONIC PUBLISHING.

(a) IN GENERAL.—

(1) PROHIBITION.—A Bell operating company and any affiliate shall not engage in the provision of electronic publishing that is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service.

(2) PERMITTED ACTIVITIES OF SEPARATED AFFILIATE.—Subject to subsection (b), nothing in this section shall prohibit a separated affiliate or electronic publishing joint venture from engaging in the provision of electronic publishing or any other lawful service in any area.

(3) RULE OF CONSTRUCTION.—Nothing in this section shall prohibit a Bell operating company or affiliate from engaging in the provision of any lawful service other than electronic publishing in any area or from engaging in the provision of electronic publishing that is not disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service.

(b) SEPARATED AFFILIATE OR ELECTRONIC PUBLISHING JOINT VENTURE REQUIREMENTS.—A separated affiliate and electronic publishing joint venture shall each—

(1) maintain books, records, and accounts that are separate from those of the Bell operating company and from any affiliate and that record in accordance with generally accepted accounting principles all transactions, whether direct or indirect, with the Bell operating company,

(2) not incur debt in a manner that would permit a creditor upon default to have recourse to the assets of the Bell operating company,

(3) prepare financial statements that are not consolidated with those of the Bell operating company or an affiliate, provided that consolidated statements may also be prepared,

(4) after 1 year from the effective date of this section, not hire—

(A) as corporate officers, sales and marketing management personnel whose responsibilities at the separated affiliate or electronic publishing joint venture will include the geographic area where the Bell operating company provides basic telephone service,

(B) network operations personnel whose responsibilities at the separated affiliate or electronic publishing joint venture would require dealing directly with the Bell operating company, or

(C) any person who was employed by the Bell operating company during the year preceding their date of hire,

except that the requirements of this paragraph shall not apply to persons subject to a collective bargaining agreement that gives such persons rights to be employed by a separated affiliate or electronic publishing joint venture of the Bell operating company,

(5) not provide any wireline telephone exchange service in any telephone exchange area where a Bell operating company with which it is under common ownership or control provides basic telephone exchange service except on a resale basis,

(6) not use the name, trademarks, or service marks of an existing Bell operating company except for names, trademarks, or service marks that are or were used in common with the entity that owns or controls the Bell operating company,

(7) have performed annually by March 31 a compliance review—

(A) that is conducted by an independent entity that is subject to professional, legal, and ethical obligations for the purpose of determining compliance during the preceding calendar year with any provision of this section that imposes a requirement on such separated affiliate or electronic publishing joint venture, and

(B) the results of which are maintained by the separated affiliate for a period of 5 years subject to review by any lawful authority, and

(8) within 90 days of receiving a review described in paragraph (7), file a report of any exceptions and corrective action with the Attorney General and allow any person to inspect and copy such report subject to reasonable safeguards to protect any proprietary information contained in such report from being used for purposes other than to enforce or pursue remedies under this section.

(c) BELL OPERATING COMPANY REQUIREMENTS.—A Bell operating company under common ownership or control with a separated affiliate or electronic publishing joint venture shall—

(1) not provide a separated affiliate any facilities, services, or basic telephone service information unless such Bell operating company makes such facilities, services, or information available to unaffiliated entities upon request and on the same terms and conditions,

(2) carry out transactions with a separated affiliate in a manner equivalent to the manner that unrelated parties would carry out independent transactions and not based upon the affiliation,

(3) carry out transactions with a separated affiliate, which involve the transfer of personnel, assets, or anything of value, pursuant to written contracts or tariffs made publicly available,

(4) carry out transactions with a separated affiliate in a manner that is auditable in accordance with generally accepted auditing standards,

(5) value any assets that are transferred to a separated affiliate at the greater of net book cost or fair market value,

(6) value any assets that are transferred to the Bell operating company by its separated affiliate at the lesser of net book cost or fair market value,

(7) except for—

(A) instances where State regulations permit in-arrears payment for tariffed telecommunications services, or

(B) the investment by an affiliate of dividends or profits derived from a Bell operating company,

not provide debt or equity financing directly or indirectly to a separated affiliate,

(8) comply fully with all applicable State cost allocation and other accounting rules,

(9) have performed annually by March 31 a compliance review—

(A) that is conducted by an independent entity that is subject to professional, legal, and ethical obligations for the purpose of determining compliance during the preceding calendar year with any provision of this section that imposes a requirement on such Bell operating company, and

(B) the results of which are maintained by the Bell operating company for a period of 5 years subject to review by any lawful authority,

(10) within 90 days of receiving a review described in paragraph (9), file a report of any exceptions and corrective action with the Attorney General and allow any person to inspect and copy such report subject to reasonable safeguards to protect any proprietary information contained in such report from being used for purposes other than to enforce or pursue remedies under this section,

(11) if it provides facilities or services for telecommunication, transmission, billing and collection, or physical collocation to any electronic publisher, including a separated affiliate, for use with or in connection with the provision of electronic publishing that is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service, provide to all other elec-

tronic publishers the same type of facilities and services on request, on the same terms and conditions or as required by a State, and unbundled and individually tariffed to the smallest extent that is technically feasible and economically reasonable to provide,

(12) provide network access and interconnections for basic telephone service to electronic publishers at any technically feasible and economically reasonable point within the Bell operating company's network and at just and reasonable rates that are tariffed (so long as rates for such services are subject to regulation) and that are not higher on a per-unit basis than those charged for such services to any other electronic publisher or any separated affiliate engaged in electronic publishing,

(13) if prices for network access and interconnection for basic telephone service are no longer subject to regulation, provide electronic publishers such services on the same terms and conditions as a separated affiliate receives such services,

(14) if any basic telephone service used by electronic publishers ceases to require a tariff, provide electronic publishers with such service on the same terms and conditions as a separated affiliate receives such service,

(15) provide reasonable advance notification at the same time and on the same terms to all affected electronic publishers of information if such information is within any one or more of the following categories—

(A) such information is necessary for the transmission or routing of information by an interconnected electronic publisher,

(B) such information is necessary to ensure the interoperability of an electronic publisher's and the Bell operating company's networks, or

(C) such information concerns changes in basic telephone service network design and technical standards which may affect the provision of electronic publishing,

(16) not directly or indirectly provide anything of monetary value to a separated affiliate unless in exchange for consideration at least equal to the greater of its net book cost or fair market value, except the investment by an affiliate of dividends or profits derived from a Bell operating company,

(17) not discriminate in the presentation or provision of any gateway for electronic publishing services or any electronic directory of information services, which is provided over such Bell operating company's basic telephone service,

(18) have no directors, officers, or employees in common with a separated affiliate,

(19) not own any property in common with a separated affiliate,

(20) not perform hiring or training of personnel on behalf of a separated affiliate,

(21) not perform the purchasing, installation, or maintenance of equipment on behalf of a separated affiliate, except for telephone service that it provides under tariff or contract subject to the provisions of this section, and

(22) not perform research and development on behalf of a separated affiliate.

(d) CUSTOMER PROPRIETARY NETWORK INFORMATION.—A Bell operating company or any affiliate shall not provide to any electronic publisher, including a separated affiliate or electronic publishing joint venture, customer proprietary network information for use with or in connection with the provision of electronic publishing that is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service that is not made available by the Bell operating company or affiliate to all electronic publishers on the same terms and conditions.

(e) COMPLIANCE WITH SAFEGUARDS.—No Bell operating company, affiliate, or separated affiliate shall act in concert with another Bell operating company or any other entity in order to knowingly and willfully violate or evade the requirements of this section.

(f) TELEPHONE OPERATING COMPANY DIVIDENDS.—Nothing in this section shall prohibit an affiliate from investing dividends derived from a Bell operating company in its separated affiliate, and subsections (i) and (j) of this section shall not apply to any such investment.

(g) JOINT MARKETING.—Except as provided in subsection (h)—

(1) a Bell operating company shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with a separated affiliate, and

(2) a Bell operating company shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with an affiliate that is related to the provision of electronic publishing.

(h) PERMISSIBLE JOINT ACTIVITIES.—

(1) JOINT TELEMARKETING.—A Bell operating company may provide inbound telemarketing or referral services related to the provision of electronic publish-

ing for a separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher, provided that if such services are provided to a separated affiliate, electronic publishing joint venture, or affiliate, such services shall be made available to all electronic publishers on request, on nondiscriminatory terms, at compensatory prices, to ensure that the Bell operating company's method of providing telemarketing or referral and its price structure do not competitively disadvantage any electronic publishers regardless of size, including those which do not use the Bell operating company's telemarketing services.

(2) TEAMING ARRANGEMENTS.—A Bell operating company may engage in nondiscriminatory teaming or business arrangements to engage in electronic publishing with any separated affiliate or with any other electronic publisher provided that the Bell operating company only provides facilities, services, and basic telephone service information as authorized by this section and provided that the Bell operating company does not own such teaming or business arrangement.

(3) ELECTRONIC PUBLISHING JOINT VENTURES.—A Bell operating company or affiliate may participate on a nonexclusive basis in electronic publishing joint ventures with entities that are not any Bell operating company, affiliate, or separated affiliate to provide electronic publishing services, provided that the participating Bell operating company or participating affiliate has not more than a 50 percent direct or indirect equity interest (or the equivalent thereof) or the right to more than 50 percent of the gross revenues under a revenue sharing or royalty agreement in any electronic publishing joint venture. Officers and employees of a Bell operating company or affiliate participating in an electronic publishing joint venture may not have more than 50 percent of the voting control over the electronic publishing joint venture. In the case of joint ventures with small, local electronic publishers, the Attorney General may authorize the Bell operating company or affiliate to have a larger equity interest, revenue share, or voting control but not to exceed 80 percent. A Bell operating company participating in an electronic publishing joint venture may provide promotion, marketing, sales, or advertising personnel and services to such joint venture.

(i) TRANSACTIONS RELATED TO THE PROVISION OF ELECTRONIC PUBLISHING BETWEEN A TELEPHONE OPERATING COMPANY AND ANY AFFILIATE.—

(1) RECORDS OF TRANSACTIONS.—Any provision of facilities, services, or basic telephone service information, or any transfer of assets, personnel, or anything of commercial or competitive value, from a Bell operating company to any affiliate related to the provision of electronic publishing shall be—

(A) recorded in the books and records of each entity,

(B) auditable in accordance with generally accepted auditing standards, and

(C) pursuant to written contracts or tariffs filed with a State and made publicly available.

(2) VALUATION OF TRANSFERS.—Any transfer of assets directly related to the provision of electronic publishing from a Bell operating company to an affiliate shall be valued at the greater of net book cost or fair market value. Any transfer of assets related to the provision of electronic publishing from an affiliate to the Bell operating company shall be valued at the lesser of net book cost or fair market value.

(3) PROHIBITION OF EVASIONS.—A Bell operating company shall not provide directly or indirectly to a separated affiliate any facilities, services, or basic telephone service information related to the provision of electronic publishing that are not made available to unaffiliated companies on the same terms and conditions.

(j) TRANSACTIONS RELATED TO THE PROVISION OF ELECTRONIC PUBLISHING BETWEEN AN AFFILIATE AND A SEPARATED AFFILIATE.—

(1) RECORDS OF TRANSACTIONS.—Any facilities, services, or basic telephone service information provided or any assets, personnel, or anything of commercial or competitive value transferred, from a Bell operating company to any affiliate as described in subsection (i) and then provided or transferred to a separated affiliate shall be—

(A) recorded in the books and records of each entity,

(B) auditable in accordance with generally accepted auditing standards, and

(C) pursuant to written contracts or tariffs filed with a State and made publicly available.

(2) VALUATION OF TRANSFERS.—Any transfer of assets directly related to the provision of electronic publishing from a Bell operating company to any affiliate as described in subsection (i) and then transferred to a separated affiliate shall

be valued at the greater of net book cost or fair market value. Any transfer of assets related to the provision of electronic publishing from a separated affiliate to any affiliate and then transferred to the Bell operating company as described in subsection (i) shall be valued at the lesser of net book cost or fair market value.

(3) PROHIBITION OF EVASIONS.—An affiliate shall not provide directly or indirectly to a separated affiliate any facilities, services, or basic telephone service information related to the provision of electronic publishing that are not made available to unaffiliated companies on the same terms and conditions.

(k) OTHER ELECTRONIC PUBLISHERS.—Except as provided in subsection (h)(3)—

(1) a Bell operating company shall not have any officers, employees, property, or facilities in common with any entity whose principal business is publishing of which a part is electronic publishing,

(2) no officer or employee of a Bell operating company shall serve as a director of any entity whose principal business is publishing of which a part is electronic publishing,

(3) for the purposes of paragraphs (1) and (2), a Bell operating company or an affiliate that owns an electronic publishing joint venture shall not be deemed to be engaged in the electronic publishing business solely because of such ownership,

(4) a Bell operating company shall not carry out—

(A) any marketing or sales for any entity that engages in electronic publishing, or

(B) any hiring of personnel, purchasing, or production,

for any entity that engages in electronic publishing, and

(5) the Bell operating company shall not provide any facilities, services, or basic telephone service information to any entity that engages in electronic publishing, for use with or in connection with the provision of electronic publishing that is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service, unless equivalent facilities, services, or information are made available on equivalent terms and conditions to all.

(l) TRANSITION.—Any electronic publishing service being offered to the public by a Bell operating company or affiliate on the date of enactment of this section shall have one year from such date of enactment to comply with the requirements of this section.

(m) SUNSET.—The provisions of this section shall not apply to conduct occurring after June 30, 2000.

(n) PRIVATE RIGHT OF ACTION.—Any person claiming that any act or practice of any Bell operating company, affiliate, or separated affiliate constitutes a violation of this section may commence a civil action in an appropriate district court of the United States for damages, for an order enjoining such act or practice or compelling compliance with such requirement, or for both.

(o) SUBPOENAS.—In an action commenced under this section, a subpoena requiring the attendance of a witness at a hearing or a trial may be served at any place within the United States.

(p) DEFINITIONS.—For purposes of this section—

(1) The term "Bell operating company" means the corporations subject to the Modification of Final Judgment and listed in Appendix A thereof, or any entity owned or controlled by such corporation, or any successor or assign of such corporation, but does not include an electronic publishing joint venture owned by such corporation or entity.

(2) The term "affiliate" means any entity that, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control with, a Bell operating company. Such term shall not include a separated affiliate.

(3) The term "basic telephone service" means any wireline telephone exchange service, or wireline telephone exchange facility, provided by a Bell operating company in a telephone exchange area, except—

(A) a competitive wireline telephone exchange service provided in a telephone exchange area where another entity provides a wireline telephone exchange service that was provided on January 1, 1984, and

(B) a commercial mobile service provided by an affiliate that is required by the Federal Communications Commission to be a corporate entity separate from the Bell operating company.

(4) The term "basic telephone service information" means network and customer information of a Bell operating company and other information acquired by a Bell operating company as a result of its engaging in the provision of basic telephone service.

(5) The term "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(6)(A) The term "electronic publishing" means the dissemination, provision, publication, or sale to an unaffiliated entity or person, using a Bell operating company's basic telephone service, of—

(i) news,

(ii) entertainment (other than interactive games),

(iii) business, financial, legal, consumer, or credit material,

(iv) editorials,

(v) columns,

(vi) sports reporting,

(vii) features,

(viii) advertising,

(ix) photos or images,

(x) archival or research material,

(xi) legal notices or public records,

(xii) scientific, educational, instructional, technical, professional, trade, or other literary materials, or

(xiii) other like or similar information.

(B) The term "electronic publishing" shall not include the following network services:

(i) Information access, as that term is defined by the Modification of Final Judgment.

(ii) The transmission of information as a common carrier.

(iii) The transmission of information as part of a gateway to an information service that does not involve the generation or alteration of the content of information, including data transmission, address translation, protocol conversion, billing management, introductory information content, and navigational systems that enable users to access electronic publishing services, which do not affect the presentation of such electronic publishing services to users.

(iv) Voice storage and retrieval services, including voice messaging and electronic mail services.

(v) Data processing services that do not involve the generation or alteration of the content of information.

(vi) Transaction processing systems that do not involve the generation or alteration of the content of information.

(vii) Electronic billing or advertising of a Bell operating company's regulated telecommunications services.

(viii) Language translation.

(ix) Conversion of data from one format to another.

(x) The provision of information necessary for the management, control, or operation of a telephone company telecommunications system.

(xi) The provision of directory assistance that provides names, addresses, and telephone numbers and does not include advertising.

(xii) Caller identification services.

(xiii) Repair and provisioning databases for telephone company operations.

(xiv) Credit card and billing validation for telephone company operations.

(xv) 911–E and other emergency assistance databases.

(xvi) Any other network service of a type that is like or similar to these network services and that does not involve the generation or alteration of the content of information.

(xvii) Any upgrades to these network services that do not involve the generation or alteration of the content of information.

(C) The term "electronic publishing" also shall not include—

(i) full motion video entertainment on demand, and

(ii) video programming.

(7) The term "electronic publishing joint venture" means a joint venture owned by a Bell operating company or affiliate that engages in the provision of electronic publishing which is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service.

(8) The term "entity" means any organization, and includes corporations, partnerships, sole proprietorships, associations, and joint ventures.

(9) The term "inbound telemarketing" means the marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call.

(10) The term "own" with respect to an entity means to have a direct or indirect equity interest (or the equivalent thereof) of more than 10 percent of an entity, or the right to more than 10 percent of the gross revenues of an entity under a revenue sharing or royalty agreement.

(11) The term "separated affiliate" means a corporation under common ownership or control with a Bell operating company that does not own or control a Bell operating company and is not owned or controlled by a Bell operating company and that engages in the provision of electronic publishing which is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service.

SEC. 5. DEFINITIONS.

Except as provided in section 4, for purposes of this Act:

(1) AFFILIATE.—The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, to own refers to owning an equity interest (or the equivalent thereof) of more than 50 percent.

(2) ALARM MONITORING SERVICE.—The term "alarm monitoring service" means a service that uses a device located at a residence, place of business, or other fixed premises—

(A) to receive signals from other devices located at or about such premises regarding a possible threat at such premises to life, safety, or property, from burglary, fire, vandalism, bodily injury, or other emergency, and

(B) to transmit a signal regarding such threat by means of transmission facilities of a Bell operating company or one of its affiliates to a remote monitoring center to alert a person at such center of the need to inform the customer or another person or police, fire, rescue, security, or public safety personnel of such threat,

but does not include a service that uses a medical monitoring device attached to an individual for the automatic surveillance of an ongoing medical condition.

(3) ANTITRUST LAWS.—The term "antitrust laws" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13 et seq.), commonly known as the Robinson Patman Act, and section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition.

(4) AUDIO PROGRAMMING.—The term "audio programming" means programming provided by, or generally considered comparable to programming provided by, a radio broadcast station.

(5) BELL OPERATING COMPANY.—The term "Bell operating company" means—

(A) Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, U S West Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company,

(B) any successor or assign of any such company, or

(C) any affiliate of any person described in subparagraph (A) or (B).

(6) CABLE SYSTEM.—The term "cable system" has the same meaning as such term has in section 602(7) of the Communications Act of 1934 (47 U.S.C. 522(7)).

(7) CARRIER.—The term "carrier" has the same meaning as such term has in section 3 of the Communications Act of 1934 (47 U.S.C. 153).

(8) COMMERCIAL MOBILE SERVICES.—The term "commercial mobile services" has the same meaning as such term has in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d)).

(9) CUSTOMER PREMISES EQUIPMENT.—The term "customer premises equipment" means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications, and includes software integral to such equipment.

(10) EXCHANGE ACCESS.—The term "exchange access" means exchange services provided for the purpose of originating or terminating interexchange telecommunications.

(11) EXCHANGE AREA.—The term "exchange area" means a contiguous geographic area established by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the Modification of Final Judgment before the date of the enactment of this Act.

(12) EXCHANGE SERVICE.—The term "exchange service" means a telecommunications service provided within an exchange area.

(13) INFORMATION.—Except as provided in paragraph (17), the term "information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or other symbols.

(14) INTEREXCHANGE TELECOMMUNICATIONS.—The term "interexchange telecommunications" means telecommunications between a point located in an exchange area and a point located outside such exchange area.

(15) MANUFACTURE.—The term "manufacture" has the meaning given such term under the Modification of Final Judgment.

(16) MODIFICATION OF FINAL JUDGMENT.—The term "Modification of Final Judgment" means the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82–0192, in the United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982.

(17) OTHER PROGRAMMING SERVICES.—The term "other programming services" means information (other than audio programming or video programming) that the person who offers a video programming service makes available to all subscribers generally. For purposes of the preceding sentence, the terms "information" and "makes available to all subscribers generally" have the same meaning such terms have under section 602(13) of the Communications Act of 1934 (47 U.S.C. 522(13)).

(18) PERSON.—The term "person" has the meaning given such term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)).

(19) STATE.—The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, Palau, or any territory or possession of the United States.

(20) TELECOMMUNICATIONS.—The term "telecommunications" means the transmission of information between points by electromagnetic means.

(21) TELECOMMUNICATIONS EQUIPMENT.—The term "telecommunications equipment" means equipment, other than customer premises equipment, used by a carrier to provide a telecommunications service, and includes software integral to such equipment.

(22) TELECOMMUNICATIONS SERVICE.—The term "telecommunications service" means the offering for hire of transmission facilities or of telecommunications by means of such facilities.

(23) TRANSMISSION FACILITIES.—The term "transmission facilities" means equipment (including wire, cable, microwave, satellite, and fiber-optics) that transmits information by electromagnetic means or that directly supports such transmission, but does not include customer premises equipment.

(24) VIDEO PROGRAMMING.—The term "video programming" has the same meaning as such term has in section 602(19) of the Communications Act of 1934 (47 U.S.C. 522(19)).

SEC. 6. RELATIONSHIP TO OTHER LAWS.

(a) MODIFICATION OF FINAL JUDGMENT.—This Act shall supersede only the following sections of the Modification of Final Judgment:

(1) Section II(C) of the Modification of Final Judgment, relating to deadline for procedures for equal access compliance.

(2) Section II(D) of the Modification of Final Judgment, relating to line of business restrictions.

(3) Section VIII(A) of the Modification of Final Judgment, relating to manufacturing restrictions.

(4) Section VIII(C) of the Modification of Final Judgment, relating to standard for entry into the interexchange market.

(5) Section VIII(D) of the Modification of Final Judgment, relating to prohibition on entry into electronic publishing.

(6) Section VIII(H) of the Modification of Final Judgment, relating to debt ratios at the time of transfer.

(7) Section VIII(J) of the Modification of Final Judgment, relating to prohibition on implementation of the plan of reorganization before court approval.

(b) APPLICATION TO OTHER ACTION.—This Act shall supersede the final judgment entered December 21, 1984 and as restated January 11, 1985, in the action styled United States v. GTE Corp., Civil Action No. 83–1298, in the United States District Court for the District of Columbia, and such final judgment shall not be enforced with respect to conduct occurring after the date of the enactment of this Act.

(c) ANTITRUST LAWS.—Nothing in this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

(d) FEDERAL, STATE, AND LOCAL LAW.—(1) Except as provided in paragraph (2), this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in this Act.

(2) This Act shall supersede State and local law to the extent that such law would impair or prevent the operation or purposes of this Act.

EXPLANATION OF AMENDMENT

Because H.R. 1528 was ordered reported with a single amendment in the nature of a substitute, the contents of this report constitute an explanation of that amendment.

SUMMARY AND PURPOSE

The "Antitrust Consent Decree Reform Act of 1995" (H.R. 1528) would replace the line of business restrictions contained in the 13-year old AT&T antitrust consent decree with a new statute. Thus, the bill's principal purpose is to supersede the Modification of Final Judgment (MFJ) entered in the AT&T case on August 24, 1982. See *United States* v. *AT&T*, 552 F. Supp. 131, 226 (D.D.C. 1982), aff'd mem. sub nom. *Maryland* v. *United States*, 460 U.S. 1001 (1983).

Specifically, H.R. 1528 would establish a new, streamlined procedure under which the regional Bell operating companies ("BOCs") may, notwithstanding the MFJ's prohibitions, obtain authorization from the Attorney General to (1) provide interexchange telecommunications services (i.e. long distance service); (2) manufacture or provide telecommunications equipment; (3) manufacture customer premises equipment; or (4) provide alarm monitoring services.

The bill states that the Attorney General shall approve the authorization requested by a BOC to engage in such activities, unless the Attorney General finds that there is a "dangerous probability" that the applicant or its affiliates would successfully use market power to substantially impede competition in the market sought to be entered. The burden of proof is on the Department of Justice (DOJ).

The Committee believes that the Department of Justice should play a key role in any statute intended to replace the consent decree. The Department of Justice, through its Antitrust Division, is the executive branch agency charged with the enforcement of the federal antitrust laws. The Antitrust Division took the legal actions that led to the entry of the consent decree in the first place. Congress is now prepared, based upon changing market place conditions, to replace that antitrust consent decree. It makes good sense to utilize the experience and expertise of the Justice Department with respect to antitrust law and the telecommunications industry during this transitional process. H.R. 1528 utilizes this experience and expertise in a highly deregulatory framework that sets strict statutory deadlines so as to expedite DOJ decisions on Bell company applications for entry.

In addition, H.R. 1528 addresses the issue of electronic publishing. H.R. 1528 prohibits the BOCs from providing electronic publishing services over their own lines until June 30, 2000, unless they do so through a separate subsidiary or joint venture. The conditions under which the BOCs can use these separate subsidiaries or joint ventures are set forth in the bill. These provisions of H.R. 1528 allow a reasonable period of transition during which the BOCs can enter into the electronic publishing market while also fairly protecting the interests of the existing electronic publishers.

The bill also requires the BOCs to submit applications to DOJ regarding new entry into the alarm monitoring services business. Applications regarding entry into alarm monitoring may be made three years after the date of enactment. However, those companies already lawfully engaged in the alarm monitoring business may continue to do so after the date of enactment.

The Committee bill carefully balances the desirability of increased competition in both the long distance and manufacturing markets with the need to protect against a significant likelihood of resultant anticompetitive activity. In short, H.R. 1528 paves the way for an orderly transition to a more competitive telecommunications industry. In doing so, it protects both the interests of consumers and the competing companies.

BACKGROUND AND NEED FOR THE LEGISLATION

Historical background

From the late 19th century until the historic 1982 consent decree was entered, the American Telephone & Telegraph Company (AT&T) dominated the American telecommunications market. The government made several efforts to control AT&T's monopoly power—a DOJ antitrust suit brought in 1913, the passage of the Communications Act of 1934, and a second DOJ antitrust suit brought in 1949. None of these efforts succeeded in opening the telecommunications market to effective competition.

Because AT&T continued to take advantage of its monopoly power to the detriment of consumers, DOJ brought a third antitrust action against AT&T in 1974. The current structure of the telecommunications industry came about as a result of that action. In the 1974 case, the government sought to prevent AT&T from using its local telephone monopoly to discriminate against its competitors in long distance and equipment manufacturing and to use revenues from its regulated monopoly in local telephone service to subsidize its other non-regulated business ventures, a practice known as cross-subsidization. That action led to a settlement and consent decree entered in 1982. *United States* v. *American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982) aff'd, 460 U.S. 1001 (1983). This consent decree is commonly known as the Modification of Final Judgment or the MFJ.

Under the terms of the MFJ, AT&T retained its long distance and manufacturing businesses, but divested itself of its local telephone exchange monopoly. Effective January 1, 1984, the local telephone exchange monopolies were taken over by seven regional Bell operating companies (BOCs)—NYNEX, Bell Atlantic, BellSouth, Ameritech, SBC Communications, Inc. (formerly known as Southwestern Bell), U.S. West, and Pacific Telesis. The BOCs are now completely separated from AT&T.

The MFJ prohibited the BOCs from entering four lines of business: (1) providing long distance service; (2) manufacturing or providing telecommunications equipment and manufacturing customer premises equipment; (3) providing information services; and (4) entering into any other non-telecommunications business. The courts have subsequently removed the restrictions on information services and non-telecommunications businesses. *United States* v. *Western Electric Co.*, 767 F. Supp. 308, 327–32 (D.D.C. 1991) (removing information services bar), aff'd, 993 F. 2d 1572 (D.C. Cir.), cert. denied, 114 S. Ct. 487 (1993); *United States* v. *Western Electric Co.*, 673 F. Supp. 525, 602–03 (D.D.C. 1987) (removing non-telecommunications business bar), aff'd in relevant part, 900 F. 2d 283 (D.C. Cir.), cert. denied, 498 U.S. 911 (1990). However, the BOCs still cannot enter the long distance business or the manufacturing business without obtaining a waiver.

Need for legislation

The BOCs contend that they would bring increased competition to the long distance and manufacturing markets. On the other hand, the long distance companies and others contend that the BOCs would be able to engage in the same types of discrimination and cross-subsidization that led to the AT&T breakup. Many observers agree, however, that under appropriate circumstances, the entry of the BOCs into the long distance and manufacturing markets would increase consumer choices and lower prices.

Under the consent decree, companies can seek waivers from the MFJ's restrictions, but they must first submit them to DOJ for review. DOJ makes a recommendation to the Court. The Court must then rule on the request.

The BOCs contend that this process is too cumbersome and that DOJ and the Court take too long to act on waiver requests. DOJ, on the other hand, maintains that it is doing a good job of moving the waiver requests along given that they have become increasingly complicated over the years the MFJ has been in effect.

Regardless of how that debate may be resolved, the 1982 consent decree has become increasingly outdated in today's fast changing telecommunications market. Neither the BOCs nor any other competitor can afford the lengthy delays involved in the waiver process. More importantly, national telecommunications policy should be set by Congress acting through generally applicable legislation rather than a single district court interpreting a consent decree entered in a specific case. If America is to move forward in the next century, it needs forward-looking legislation to open the telecommunications market to full competition—not the continued restraints of a consent decree entered when the market looked entirely different.

PREVIOUS COMMITTEE CONSIDERATION

H.R. 1528 represents the culmination of extensive Judiciary Committee examination of antitrust policy in the telecommunications industry, extending back as far as the 86th Congress.

As early as 1959, the Committee held oversight hearings into the Department of Justice's enforcement of antitrust laws in the telecommunications industry. The Department of Justice had filed a Sherman Act suit against AT&T in 1949, charging the Western Electric and AT&T had been engaged in a continuing conspiracy to monopolize and restrain trade in the manufacture, distribution, and sale of telephones and telephone equipment. The complaint requested that Western Electric be divested from the Bell System, and that Western Electric and Bell Laboratories be required to license their patents to competitors on a reasonable basis. In 1956, the case was settled by a consent decree which contained virtually none of the relief originally sought. In fact, it bore little relevance to the original premise of the case: that the exclusive purchasing arrangement between Western Electric and the rest of the Bell monopoly was inherently anticompetitive and inflationary.

Because of the vast disparity between the relief the Justice Department originally sought in the 1949 case and the relief it actually obtained in the 1956 consent decree, the Committee in 1959 conducted an investigation to determine whether the "Department of Justice had given AT&T special and preferred treatment." The Committee's investigation uncovered an elaborate campaign to undermine the case, orchestrated and executed by AT&T, in which AT&T enlisted the aid of top officials in the FCC, the Defense Department, and the Justice Department itself.

These revelations led the incoming Administration to impose consent decree procedures designed to encourage full public and court review before a consent decree became final. Continuing Congressional concern that the Justice Department's consent decree procedures remained shrouded in secrecy and unaccountability led to the enactment of the "Antitrust Protection and Procedures Act of 1974," commonly known as the Tunney Act. It was pursuant to the Tunney Act that the MFJ was reviewed and adopted by the District Court.

The Committee once again had occasion to consider issues raised by AT&T's vertically integrated monopoly in 1980, when the "Telecommunications Act of 1980" (H.R. 6121) was jointly referred to it. The bill would have deregulated substantial portions of AT&T's activities, without mandating any sort of divestiture of those subsidiaries active in the competitive lines of business. The Committee on Interstate and Foreign Commerce favorably reported the bill. This partial victory in hand, AT&T began efforts to have the 1974 Sherman Act case against it dismissed, arguing that Congress, rather that the courts, was the proper forum for resolution of issues relating to industry structure.

The Judiciary Committee, after conducting several hearings on the antitrust implications of H.R. 6121, reported the legislation adversely. In contrast to the structural relief sought by the Department in its suit, the bill would not only not require divestiture, but would also allow AT&T entry into substantial new areas of business activity which were off-limits under the 1956 consent decree. Following the Judiciary Committee's unfavorable report, H.R. 6121 saw no further action. Several years thereafter, the 1974 suit was concluded with the entry of the MFJ that now governs BOC conduct.

The path to MFJ reform legislation, and specifically to the "Antitrust Consent Decree Reform Act" (H.R. 1528), has been paved by numerous Committee hearings, which were held as far back as the 100th Congress.

In 1987, the Subcommittee on Economic and Commercial Law began developing a record for possible legislation to replace the MFJ's line-of-business restrictions with a statutory framework. An oversight hearing was held on April 29, 1987 to explore this subject; witnesses from all facets of the telecommunications industry were called, including John D. Zeglis, Senior Vice President and General Counsel, American Telephone & Telegraph Co.; Robert A. Levetown, Executive Vice President and General Counsel, Bell Atlantic; George J. Vasilakos, President and Chief Executive Officer, ALC Communications Corporation; Robert W. Crandall, Senior Fellow, the Brookings Institution; Manley R. Irwin, Professor, Whittemore School of Business & Economics, University of New Hampshire; Gene Kimmelman, Legislative Director, Consumer Federation of America; and the Honorable Sharon L. Nelson, Chairman, Washington Utilities and Transportation Commission.

Further oversight hearings regarding the MFJ and competition policy in the telecommunications industry were held on August 1 and 2, 1989. Once again, a full range of views and interests were represented by the various witnesses. Testifying were John D. Zeglis, Senior Vice President-General Counsel, Government Affairs, American Telephone & Telegraph Co.; William G. McGowen, Chairman, MCI Communications Corp.; Casimir S. Skrzypczak, Vice President, NYNEX Corp.; Lee G. Camp, Vice President, Pacific Bell; Alan C. Hasselwander, Chairman, United States Telephone Association and President and Chief Executive Officer, Rochester Telephone Corp.; Sam Ginn, Chairman and Chief Executive Officer, Pacific Telesis Group; Stephanie Biddle, Executive Vice President, Computer & Communications Industry Association; Barbara Easterling, Executive Vice President, Communications Workers of America; William T. Esrey, President and Chief Executive Officer, United Telecommunications, Inc.; Allen R. Frischkorn, President, Telecommunications Industry Association; Albert Halprin, Partner, Meyerson Kuhn & Sterret; Robert M. Johnson, Publisher, President and Chief Executive Officer, Newsday, Inc., on behalf of the American Newspaper Publishers Association; Brian R. Moir, Partner, Fisher, Wayland, Cooper & Leader, on behalf of the International Communications Association; Wayne Robins, Chairman, Competitive Telecommunications Association and President, ITT Communications Services, Inc.; Thomas F. Smith, Chairman, Alarm Industry Communications Committee and Chairman, Security, Inc.; Edwin B. Spievack, President, North American Telecommunications Association; Philip L. Verveer, Partner, Willkie, Farr & Gallagher, on behalf of the National Cable Television Association; and Patricia M. Worthy, Vice Chairman, National Association of Regulatory Commissioners and Chairman, District of Columbia Public Service Commission.

The subject of competition policy in the telecommunications industry was once again examined by the Subcommittee in the 102nd Congress. In three days of comprehensive hearings, the Subcommittee heard that there was a need for legislative action to replace the MFJ and refine policies governed by the MFJ. William G. McGowen, Chairman and Chief Executive Officer, MCI Communications Corp.; Edward E. Whitacre, Chief Executive Officer, Southwestern Bell Corp., on behalf of all the BOCs; Randall L. Tobias, Vice Chairman, American Telephone & Telegraph Co.; Kenneth B. Allen, Senior Vice President, Information Industry Association; Ronald J. Binz, President, National Association of State Utility Consumer Advocates; Stephanie Biddle, Executive Vice President, Computer & Communications Industry Association; Cathleen Black, President and Chief Executive Officer, American Newspaper Publishers Association; Barbara J. Easterling, Executive Vice President, Communications Workers of America; Gene Kimmelman, Legislative Director, Consumer Federation of America; and Edwin B. Spievack, President, North American Telecommunications Association constituted the panelists at the initial August 1, 1991 hearing.

Later that year, the Court removed the MFJ restrictions on BOC provision of information services, thereby allowing BOC free entry into these markets. This significant change in the parameters governing BOC activity spurred the Committee to expand its hearings and to sharpen its focus. The Subcommittee expressly announced its intention to use a February 19, 1992 hearing to help it develop comprehensive legislation to ensure a competitive telecommunications marketplace. Testifying were Robert E. Allen, Chairman of the Board and Chief Executive Officer, American Telephone & Telegraph Co.; Ivan Seidenberg, Vice Chairman, NYNEX Corp.; Bert C. Roberts, Jr., President and Chief Executive Officer, MCI Communications Corp.; Cathleen Black, President and Chief Executive Officer, American Newspaper Publishers Association; Daniel J. Bruns, President and Chief Executive Officer, General Videotex Corp.; David E. Easterly, President, Cox Newspapers; Stephen T. Lynn, President, International Brotherhood of Electrical Workers, Local 1898; Dwight D. Opperman, President and Chief Executive Officer, West Publishing Co.; and John V. Roach, Chairman and Chief Executive Officer, Tandy Corp.

On March 18, 1992, hearings resumed with testimony from James F. Rill, Assistant Attorney General Antitrust Division, Department of Justice; Alfred C. Sikes, Chairman, Federal Communications Commission; Thomas J. Sugrue, Acting Assistant Secretary for Communications and Information, Department of Commerce; Hubert H. Humphrey III, Attorney General, State of Minnesota; and David W. Rolka, Chairman, Pennsylvania Public Utility Commission.

Those hearings led to the introduction of H.R. 5096, the "Antitrust Reform Act of 1992," which would have superseded the MFJ's core line-of-business restrictions, establishing a unified procedure and standard for the BOCs to use in applying for authorization to engage in long distance and manufacturing. In addition, it would have reinstated the prior MFJ restrictions on information services, and required a BOC to follow the approval process for entry into those markets. H.R. 5096 was referred solely to the Judiciary Committee, which favorably reported it on August 12, 1992.

As reported by the Committee, H.R. 5096 contained an entry test paralleling the standard in the MFJ, requiring a BOC applying for entry to prove that "there is no substantial possibility that [it] could use monopoly power to impede competition in any relevant market for the activity to which the application relates."

Under the bill, a BOC wishing to obtain permission to engage in research and development relating to telecommunications equipment or customer premises equipment, provide information services, manufacture or provide telecommunications equipment, manufacture customer premises equipment, or long distance services would apply to the Attorney General for approval, who would then have 130 days to determine whether the proposed activity satisfied the entry test. The BOCs would be entitled to apply for entry into these new markets upon enactment of the legislation, except with respect to long distance and alarm monitoring, for which the application process would open in 5 years. Interested parties would be permitted to submit comments on any application. The Attorney General's determination would be subject to de novo review by the United States Court of Appeals for the District of Columbia, after which a ruling would become final.

On October 1, 1992, The House Committee on Rules held a hearing on H.R. 5096, but it was never scheduled for floor consideration prior to adjournment of that Congress.

In the 103rd Congress, hearings focused on H.R. 3626, the "Antitrust and Communications Reform Act of 1993." H.R. 3626 was also intended to replace the MFJ restrictions with a statutorily imposed procedure for BOC entry into the remaining restricted lines of business; it would have allowed the BOCs to enter manufacturing, long distance, electronic publishing and alarm monitoring, subject to specific conditions.

Under H.R. 3626, a BOC could apply immediately for authority to provide long distance services, and after 66 months from the date of enactment, for authorization to provide alarm services. Entry into the long distance and alarm services markets was conditioned upon approval of applications submitted simultaneously to the Attorney General and the Federal Communications Commission. Determinations by each would be required within 180 days. Applications were to be granted only when the Attorney General found that "there is no substantial possibility that such company or its affiliates could use monopoly power to impede competition in the market such company seeks to enter," and the FCC found that granting the application is "consistent with the public interest, convenience, and necessity." Each of these determinations would be subject to judicial review by the United States Court of Appeals for the District of Columbia.

The provision of intrastate and resale long distance services would not be governed by the above procedure. Instead, a BOC would be permitted entry into these markets if the Attorney General failed to commence a civil action to enjoin the conduct within 90 days of notification of the BOC's intent to begin service.

Entry into manufacturing under H.R. 3626 would be allowed after one year of enactment, provided that the BOC gave notification to the Attorney General of its intentions, and no civil suit was commenced within one year after notification. In addition, H.R. 3626 contained provisions regulating the provision of electronic publishing services by the BOCs.

After the bill was jointly referred to the Committee on the Judiciary and the Committee on Energy and Commerce, the Economic and Commercial Law Subcommittee held three days of legislative hearings. The first hearing, on January 26, 1994, included testimony from Anne K. Bingaman, Assistant Attorney General, Antitrust Division, Department of Justice; Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce; Peter W. Huber, Partner, Kellogg, Huber & Hansen; and Philip L. Verveer, Partner, Willkie, Farr & Gallagher. At the Subcommittee's February 2, 1994 hearing, witnesses included Reed E. Hundt, Chairman, Federal Communications Commission; James G. Cullen, President, Bell Atlantic Corp.; Richard W. Odgers, Executive Vice President and General Counsel, Pacific Telesis Group; Edward E. Whitacre, Jr., Chairman and Chief Executive Officer, Southwestern Bell Corp.; John D. Zeglis, Senior Vice President-General Counsel, Government Affairs, American Telephone & Telegraph Co.; William T. Esrey, Chairman and Chief Executive Officer, Sprint Corp.; and Bernard J. Ebbers, Chairman of the Board of Directors, Competitive Telecommunications Association and President and Chief Executive Officer, LDDS Communications. The third day of hearings, on February 10, 1994, focused on electronic publishing, alarm monitoring, and manufacturing. Testifying on these subjects were Frank A. Bennack, Jr., President and Chief Executive Officer, Hearst Corp., on behalf of the Newspaper Association of America; Allen R. (Mike) Frischkorn, Jr., President, Telecommunications Industry Association; Robert M. McGlotten, Legislative Director, AFL-CIO, and on behalf of the Communications Workers of America and International Brotherhood of Electrical Workers; Vance K. Opperman, president, West Publishing Group and Electronic Publishing Group; and Emil J. Wengel, President, Virginia Burglar and Fire Alarm Association and Chairman, Legislative Committee, National Burglar and Fire Alarm Association.

Both the Judiciary Committee and the Energy and Commerce Committee favorably reported H.R. 3626, and a final agreed-upon substitute version passed the House on June 28, 1994 by a vote of 423–5. The bill failed to become law when similar legislation did not pass in the Senate.

HEARING

On May 2, 1995, Judiciary Committee Chairman Henry J. Hyde introduced the "Antitrust Consent Decree Reform Act of 1995" (H.R. 1528), the latest in the series of proposals to replace the MFJ by statute. Shortly thereafter, on May 9, 1995, the full Judiciary Committee conducted a hearing focusing on the role of the Department of Justice in telecommunications and on the Chairman's bill.

Four witnesses testified: Anne K. Bingaman, Assistant Attorney General, Antitrust Division, Department of Justice; Bert C. Roberts, Jr., Chairman and Chief Executive Officer, MCI Communications Corporation; Thomas P. Hester, Executive Vice President and General Counsel, Ameritech; and Timothy J. Regan, Division Vice President, Corning Incorporated.

Assistant Attorney General Bingaman expressed the Department of Justice's view that the remaining MFJ line-of-business restrictions should eventually be lifted, so as to allow every company to compete in every market for every customer. She cautioned, however, that entry into new markets must be conditioned on a judgment as to the BOCs' ability to leverage their local bottleneck in a manner that would impede competition in the new market. Were this not done, she said, we would see "the re-creation of the old Bell system, this time on a regional rather than national basis * * *."

Ms. Bingaman argued that the responsibility for judging the competitive effect of BOC entry should be assigned to the Department of Justice, which is the agency entrusted with enforcement of the antitrust laws:

> What we are embarking on now as a Nation is the last step toward competition; how to let the Bell companies into these two adjacent markets, manufacturing and long distance . . . . What we have come to as a Nation is to open up the local monopoly and to allow them in if they open up. And the Chairman's recognition of the importance of a role for the Department of Justice in this historic last phase of injecting competition into telecommunications is vital and we appreciate the Chairman's bill in this regard.

She stressed that the Department is uniquely positioned to assess what is actually happening in the market and the implications of the removal of restrictions on the BOCs, pointing to the decade of experience the Antitrust Division has accrued by its participation in the MFJ waiver process as evidence.

She also highlighted the ongoing role played by the Department in searching for ways to remove the line-of-business restrictions consistent with protecting competition in markets that the BOCs seek to enter. The recent waiver request filed by Ameritech was given as an example of options being explored to grant BOCs relief from MFJ restrictions; under that plan Ameritech would be allowed into long distance once it faces actual local exchange competition and there are substantial opportunities for additional competition in the local exchange. In her view, when crafting this arrangement with Ameritech, the Department "deepened its already extensive expertise in telecommunications competition and its understanding of the competitive implications of Bell Company entry into long distance."

Ms. Bingaman also sought to counter criticisms that a Department of Justice role would cause unnecessary delay to BOC entry into new lines of business. She repeatedly assured the Committee that sufficient manpower and resources are available to meet the 180-day timetable provided in H.R. 1528 for DOJ review of BOC applications. She also contended that requiring pre-entry review by the Department of Justice would lead to long term savings in time and money, as it would reduce or eliminate the likelihood of complex, expensive antitrust suits.

The remaining witnesses unanimously concurred in the view that the Department of Justice is the appropriate agency to conduct pre-entry review of BOC entry into new markets. Thomas Hester, Executive Vice President and General Counsel to Ameritech, stated:

> We agree with your proposal that Bell operating companies should be permitted to apply for authority to engage in the provision of long distance services and equipment manufacturing, that their requests should be reviewed expeditiously subject to a prescribed timetable, and that it is appropriate for the Department of Justice to evaluate such requests pursuant to objective, well-established antitrust standards, such as the concept of market power, as provided in your proposed legislation.

Similarly, Bert C. Roberts, Jr., Chairman and CEO of MCI Communications Corp., stressed the importance of a Department of Justice role:

> As the courts have uniformly recognized, Congress intended telecommunications carriers to be subject to the antitrust laws. * * * DOJ has played an extraordinarily important and constructive role in promoting competition in telecommunications markets. While the Bell system was able to stymie the FCC's efforts to introduce competition in the 1970's, DOJ was able to get the Bell System to take the steps that have opened up long distance and manufacturing markets to unprecedented competition. As noted earlier, that competition has produced dramatically lower prices, explosive technological innovation and vastly expanded choice for consumers. Competition has benefited residential customers, large and small businesses, and both rural and urban America.
>
> Through decades of experience, DOJ has developed substantial expertise in telecommunications markets. DOJ has effectively promoted telecommunications industry competition on a non-partisan basis. * * * Through this combination of experiences, DOJ has gained special insight into ways of effectively promoting telecommunications competition.

Timothy J. Regan, Division Vice President and Director of Public Policy for Corning Incorporated, echoed those views:

> As far as the Justice Department's role, we believe Justice should participate at both ends of the decision to allow entry. That is, to the extent that a public interest or competition standard must be met before entry is allowed, Justice should have a role in making the determination. Similarly, Justice should be involved in post-entry procedures to ensure compliance with laws governing competition.

The witnesses disagreed, however, as to the proper standard to be used in analyzing the effect of a BOC's entry into the new market and as to who should bear the burden of proof. Assistant Attorney General Bingaman contended that it would be very difficult, if not impossible, for the Department to prove a dangerous probability of monopolization by clear and convincing evidence, and that the burden of proof should be on the BOCs. Mr. Roberts agreed, arguing that the MFJ Section VIII(C) standard should be used, and that the burden of proof should remain on the BOCs. In contrast, Mr. Hester supported use of a Sherman 2 standard with the burden of proof on the Department. He recognized that this was the standard imposed under H.R. 1528, as introduced, and stated that the bill "avoids the bureaucratic and regulatory approach of the past and will create a competitive telecommunications marketplace where consumers will reap the benefits." Mr. Hester emphasized the importance of placing the burden of proof on the Department of Justice:

> Under your bill, that burden [of proof] shifts to the Department of Justice which I think is a step in the right direction, because I characterize your bill as recognizing the benefits of competition, moving the industry, telecommunications industry towards the mainstream of antitrust law. That is towards the point where we will be treated like any other industry in this country. And in that sense, the Department in exercise of its enforcement decision-making, has the burden of proof as you have placed it in your bill.

Mr. Regan took no position on the entry standard which should be applied, but stressed the need for post-entry safeguards, such as separate subsidiaries and prohibitions against discriminatory behavior and cross-subsidization.

PROVISIONS OF H.R. 1528—DEPARTMENT OF JUSTICE ROLE

The goal of H.R. 1528 is to increase competition in the telecommunications industry. It seeks to achieve this goal in a logical, straight-forward manner. Specifically, the Department of Justice—the competition agency—is given the job of deciding whether BOC entry into currently prohibited lines of business would seriously and adversely effect competition in those markets. In making these determinations, the Justice Department would apply a very specific antitrust competition standard.

DOJ has more than twenty years of experience in dealing with the issues relating to the breakup of AT&T and competition in the telecommunications industry generally. The Antitrust Division has more than 50 people, including lawyers, economists and paralegals, who have extensive experience with this subject. Given its extensive experience and expertise, Justice is the appropriate agency to analyze the fundamental competition issues presented by prospective BOC entry into these new markets.

Current law treats telecommunications markets as regulated entities. In contrast, H.R. 1528 does not mandate the issuance of any new federal regulations. No new regulatory agency is established; nor is any existing regulatory scheme enhanced or embellished. Instead, H.R. 1528 would provide for an expedited procedure whereby the DOJ would review BOC applications for entry into long distance, manufacturing, and alarm services under a specific antitrust test.

Under H.R. 1528, the Bell operating companies could apply to enter the long distance and manufacturing markets on the date of enactment. (A similar application to provide alarm monitoring services could be filed three years after the date of enactment.) DOJ will then publish the application in the Federal Register within ten days. Not later than 45 days after the application is published, interested persons may submit comments to DOJ. DOJ shall make its determination within 180 days after receiving the application. IF DOJ does not act within that time period, the application will be deemed approved. DOJ shall publish the determination in the Federal Register within ten days. The Bell operating company, or any person who would be injured in its business or property as a result of the determination, may then seek judicial review of DOJ's determination within 30 days after DOJ publishes its determination in the Federal Register.

The Committee believes that the threshold question of Bell company entry into the currently prohibited lines of business should be judged under antitrust law principles. That is, it should be based upon the actual state of competition in the marketplace and the effect of Bell entry on competition. Bell entry into businesses in which they currently hold no market share need not be artificially delayed until a new and more complicated regulatory structure is in place. The impact that Bell entry will have on the marketplace can be judged right now, through traditional antitrust market analysis by the Antitrust Division of the Justice Department. By analyzing the geographic, product and service markets to be affected, they would determine the probable consequences of Bell entry on competition and are the best equipped to do so. Again, a company's entry into new markets is properly one of competition analysis and not regulatory enforcement. Regulation and regulatory oversight may properly be applied to a company's behavior, once it has entered into the business or businesses.

Thus, H.R. 1528 is highly deregulatory in its approach. Competition, not more regulation, is the key to increased consumer choice and lower prices. Under H.R. 1528, the antitrust consent decree would be promptly replaced by a transitional statute utilizing the expertise of the existing antitrust enforcement agency. The bill will provide a means to move from the consent decree to open competition while providing an antitrust review during the transition. The Committee bill will also save resources by avoiding costly and time-consuming litigation that might result if DOJ has no pre-entry role.

The major complaint about DOJ's role in the MFJ waiver process has been the amount of time DOJ takes in making its decisions. For that reason, H.R. 1528 requires DOJ to make a decision on a BOC's application within six months. No extensions of the 180-day period or "second request" procedures are authorized. If DOJ does not act within that six month period, a BOC's application will be deemed approved.

H.R. 1528 further provides that the BOC or "any person who would be injured in its business or property as a result of [DOJ's] determination" may petition for a review of the determination by the United States Court of Appeals for the District of Columbia Circuit. This direct petition to the Court of Appeals will eliminate one of the time-consuming steps—district court review—that currently slows the ultimate resolution of waiver requests.

Nature of the review

The Committee bill will make it less difficult for the BOCs to enter new businesses than it is under the terms of the MFJ and its line of business restrictions. Section VIII(C) of the MFJ, which currently governs BOC entry into the new businesses, requires "the petitioning BOC" to demonstrate "that there is *no substantial possibility* that it could use its monopoly power to impede competition in the market it seeks to enter." *AT&T*, 552 F.Supp. at 231 (emphasis added). In the Committee's judgment, the MFJ section VIII(C) standard is too restrictive. It has essentially prohibited BOC entry into these markets. The result has been more of an entry barrier than an entry test.

In particular, it places the burden on the BOCs to demonstrate their entitlement to compete in these markets rather than placing the burden on the government to show why new competition should be barred. The MFJ section VIII(C) standard inappropriately requires the BOCs to prove a negative—that there is "no substantial possibility" that they will harm competition. This standard invites the existing competitors to invent all manner of hypothetical risks in an effort to show some "possibility" of competitive harm. The experience under the MFJ has shown that a more precise and balanced standard is needed.

Burden of proof

In contrast to MFJ section VIII(C), subsection 2(b)(2)(B) of H.R. 1528 places the burden of proof on the Justice Department rather than on the petitioning BOC. Subsection 2(b)(2)(B) provides that DOJ shall approve the BOC application unless it finds that the application violates the antitrust standard contained in the bill. If the record before DOJ does not contain enough evidence to support a finding of a violation of the antitrust standard, then DOJ must approve the application. In the Committee's judgment, the government or a private party with standing should bear the burden of justifying any bar to the new competition that BOC entry would bring to the new markets.

The normal practice that would apply but for the existence of the MFJ is that any company may enter a market and continue in that market, unless and until the government or an affected private party successfully challenges the entry. If it does so, it must prove a case of violation of the antitrust laws by a preponderance of the evidence to block market entry. This normal practice of having the burden rest on the government or the private party challenging the entry fulfills the fundamental goal of the antitrust laws to protect and increase competition. H.R. 1528 simply restores the normal practice here and removes an impediment to BOC market entry that the MFJ now imposes. Because the regional BOCs did not even exist at the time the MFJ was negotiated, they should not continue to bear the MFJ burden of having to prove—prior to entering the market—that they will not behave anticompetitively in the future.

Degree of proof

As introduced, H.R. 1528 provided that DOJ would have to find a violation of the antitrust standard by the heightened evidentiary standard of "clear and convincing evidence." During full Committee consideration of H.R. 1528, Chairman Hyde and Ranking Member Conyers offered an amendment which, among other things, deleted that language. The Hyde-Conyers amendment was adopted by unanimous voice vote. Because of that change, DOJ will now apply the normal evidentiary standard in civil cases—a preponderance of the evidence—in determining whether BOC entry will violate the antitrust standard.

Antitrust standard

Subsection 2(b)(2)(B) of H.R. 1528 contains the antitrust law standard that the Justice Department will apply to applications from the Bell companies. The language states: "(t)he Attorney General shall approve the granting of the authorization requested in the application unless the Attorney General finds that there is a dangerous probability that such company or its affiliates would successfully use market power to substantially impede competition in the market such company seeks to enter. The Attorney General may approve all or part of the requested authorization." Although drawn in part from court cases interpreting Section 2 of the Sherman Act (15 U.S.C. § 2), the antitrust standard contained in the bill is a new standard designed specifically to govern BOC entry into new lines of business. This new standard was added by the same Hyde-Conyers amendment discussed earlier in connection with the degree of proof required.

The new standard would replace the burdensome MFJ section VIII(C) test. The MFJ section VIII(C) test and the accompanying procedures have been used by existing service providers as a way to avoid or delay the entry of new competitors into the market. Protection of consumers and enhancement of competition in telecommunications are primary goals of the Committee, and the introduction of additional competitors in a market is generally the most effective way of furthering these goals.

This new standard differs from MFJ section VIII(C) in several important respects. First, it focuses on what a BOC "would" do if permitted to enter the new market rather than on what it "could" do and on whether the BOC's action would "substantially" impede competition. By using these words, the Committee intends to foreclose arguments based on hypothetical risks and incentives that BOC competitors have used to stifle competition under the MFJ. Instead, DOJ's determination must focus on actual probabilities grounded in a particular company's record of business conduct.

Second, the new standard allows the DOJ to bar entry only upon a finding that there is a "dangerous probability" that the BOC would substantially impede competition rather than upon a negative showing of the absence of a "substantial possibility." Third, the new standard requires a showing of a dangerous probability that the BOC would "successfully" use market power to substantially impede competition, whereas under MFJ section VIII(C) it was not necessary to show a likelihood that BOCs would successfully impede competition.

The first element of the antitrust standard, the phrase "dangerous probability," comes from the traditional test for an attempted monopolization case under Section 2 of the Sherman Act, which the courts have developed in case law. The Supreme Court has recently set forth those elements:

> It is generally required that to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) *a dangerous probability* of achieving monopoly power.

Spectrum Sports, Inc. v. *McQuillan,* 113 S.Ct. 884, 890 (1993) (emphasis added; citation omitted). H.R. 1528's new antitrust standard does not incorporate the requirements that there be an intent to monopolize or prior anticompetitive conduct.

In *Spectrum Sports,* the Court held that demonstrating a dangerous probability "requires inquiry into the relevant product and geographic market and the defendant's economic power in the market." Id. at 892. Under the application procedure in H.R. 1528, the BOC's application will be the starting point for defining the relevant product and geographic market. However, DOJ may find that a different market definition is the correct one based on the record before it. For example, DOJ and the BOC might disagree as to whether the proper market definition is long distance service throughout the United States or long distance service within the BOC's region. In the manufacturing markets, DOJ and the BOC might disagree as to whether one particular piece of telecommunications equipment constitutes a market or whether other pieces of equipment ought to be included. DOJ's determination should state its findings as to what the relevant geographic and product markets are.

As to the BOCs' economic power in the market, courts have traditionally looked to a number of factors. See, e.g., *Barr Laboratories, Inc.* v. *Abott Laboratories,* 978 F.2d 98, 112 (3d Cir. 1992); *International Distribution Centers, Inc.* v. *Walsh Trucking Co.,* 812 F.2d 786, 791–92 (2d Cir.), cert. denied, 482 U.S. 915 (1987). The foremost among these has been market share. *Barr,* 978 F.2d at 112; *Walsh,* 812 F.2d at 791–92. At the pre-entry stage, the BOCs will, of course, have little, if any, market share.

The other factors courts have considered include the strength of competition in the market, the probable development of the industry, the barriers to entry, the nature of the (in this case, future) anticompetitive conduct, and the elasticity of consumer demand. *Barr,* 978 F.2d at 112; *Walsh,* 812 F.2d at 792. See *C.A.T. Industrial Disposal, Inc.* v. *Browning Ferris Industries, Inc.,* 884 F.2d 209, 211 (5th Cir. 1989) (determining dangerous probability by reference to factors other than market share); *Shoppin' Bag of Pueblo, Inc.* v. *Dillon Companies, Inc.,* 783 F.2d 159, 162 (10th Cir. 1986) (same). See also *United States* v. *Columbia Steel Co.,* 334 U.S. 495, 527 (1948). To the extent that it is not subsumed within these factors, DOJ should also consider the potential effect on the market of the BOC's control of the local exchange monopoly, including the likelihood of cross-subsidization and/or discrimination against its competitors.

The second part of the test, the phrase "to substantially impede competition" is new language based on existing antitrust principles. The use of the word "substantially" is intended to relieve the BOC of the herculean task of proving that there is not conceivable manner in which it might use its market power to impede competition. The use of the word "substantially" precludes DOJ from relying on theoretical possibilities unless there is sufficient evidence to support the contention that the claimed possibility is, in fact, a dangerous probability. In short, in reviewing applications under H.R. 1528, DOJ should consider the hard evidence in the record before it as to what will likely occur in the marketplace and how the BOC has behaved in the past—it should not engage in speculation.

The Committee intends that the phrase "impede competition" should have the meaning the courts have traditionally applied to monopoly power—"the power to control prices or exclude competition." *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Thus, the Bell company would have to be able either to raise prices or restrict output in a manner that would have a substantial impact on the market it seeks to enter.

The relevant market in which to analyze these variables will be the market which the BOC is seeking to enter. Thus, DOJ's analysis should focus on whether the BOCs will have the ability to raise prices or restrict output in those markets—long distance, manufacturing, or alarm monitoring—not the local exchange market. The DOJ determination should specifically state the facts and evidence from which it draws the conclusion that the BOC will have this ability in the new market

Appellate review

The determinations made by the Attorney General under subsection 2(b)(2) are to be considered final agency actions in the administrative law meaning of that term and thus subject to judicial review. However, if no petition is filed within the time period provided by subsection 2(c), then the determination is no longer subject to judicial review.

Under subsection 2(c)(4), the District of Columbia Circuit Court of Appeals will apply an Administrative Procedure Act (5 U.S.C. § 706) standard in its review of Justice Department determinations. The Court may apply any of the applicable standards contained in section 706. H.R. 1528 does not provide for an on-the-record hearing, but makes it clear that the Court should nonetheless conduct a review of DOJ's determination to see that it is supported by substantial evidence. In conducting this review, the Court will rely on the record certified and provided to it by DOJ under subsection 2(c)(2).

The purpose of subsection 2(b)(4) ("Finality") is to make it clear that BOC entry into a service or activity due to a favorable determination by DOJ will be lawful while the determination is the subject of a petition for judicial review under subsection 2(c). A BOC can continue in the relevant business until the determination is vacated or reversed by the D.C. Circuit. Of course, a party can seek a preliminary injunction under the normal Federal civil rules, seeking to enjoin Bell entry pending the outcome of the action for judicial review.

The normal Federal Rule of Appellate Procedure will govern review before the Court of Appeals for the D.C. Circuit. Applying these rules, a petition filed pursuant to subsection 2(c) would be ripe for hearing by the Court no later than 164 days after the determination which it challenges is issued by the Attorney General. This time period could be shortened in the event that parties do not consume the entire time allowed them for each stage of the procedure.

In brief, subsection 2(b)(3) requires that the Attorney General's determination be published within 10 days of issuance. Not more than 30 days following publication, subsection 2(c) permits the filing of a petition challenging the determination. The Rules of Appellate Procedure then direct the Agency to file the record within 40 days of service of the petition. Any motions for intervention are due within 30 days of filing of the petition. Forty days after filing of the record, the petitioner's brief is due. Responsive briefs are to be filed within 30 days, and reply briefs within 14 days thereafter. The Court then has discretion as to the timing of oral argument and later issuance of its ruling.

The Court of Appeals would be required to consolidate petitions arising under subsection 2(c) to the extent that they pertained to the same application.

Exceptions to authorization requirement

Section 3 of H.R. 1528 provides several exceptions to the general requirement that the Bell companies cannot enter into the long distance, manufacturing, and alarm monitoring businesses without specific authorization.

Existing waivers

Under subsection 3(b), the BOCs may continue to engage in any business for which the District Court for the District of Columbia has previously granted a waiver under the MFJ. In addition, for waivers that are pending with the Court on or before the date of enactment, the Court may rule and the BOC (for any other party) may act in accordance with the Court's order. However, this exception does not cover those waiver requests that have only been filed with DOJ and that have not yet been brought before the Court.

Alarm monitoring

Subsection 2(a)(2)(B) authorizes a Bell operating company to apply to provide alarm monitoring services 3 years after the date of enactment. Until such application is granted, pursuant to subsection 3(a), a Bell operating company may not provide alarm monitoring services. Recognizing, however, that under current law there is no restriction on the provision of alarm monitoring services by a BOC, subsection 3(c) "grandfathers" any alarm monitoring services being provided by a Bell operating company on or before the date of enactment. Thus, any BOC that is providing alarm monitoring services on or before the date of enactment may continue providing alarm monitoring services, notwithstanding the prohibition of subsection 3(a). It is the intent of the Committee that any such company be permitted to manage and conduct their alarm monitoring services as would any other industry participant, without arbitrary restrictions on customer acquisition or growth of the business.

Out of region long distance

Subsection 3(d) provides that the BOCs may enter the long distance market for calls that originate outside of their service area. Because a BOC does not control the local exchange in these areas, there can be no danger that they will leverage their market power to gain an unfair competitive advantage. Entry into out of region long distance may commence immediately upon enactment of the bill.

Incidental relief

Subsection 3(e) lists several exceptions which will permit the BOCs, on the date of enactment, to provide designated long distance services deemed "incidental" to activities in which various BOCs are already lawfully engaged, at any time after the date of enactment. These include information services, cable television services and commercial mobile radio services.

Subsection 3(e)(1) stipulates that nothing in subsection (a) shall prohibit a Bell operating company from providing cable service to subscribers. Subsection 3(e)(2) addresses a related concern: as Bell operating companies enter the cable business outside their service territory, some may have an interest in providing telephone service as well as cable service. This provision ensures that as BOCs enter the cable business outside of their service territory no impediments will stand in their way of fully competing with an incumbent telephone company. This provision should trigger little concern, since the company is operating outside of its service territory, and hence it should have no ability to use its bottleneck facilities in a discriminatory fashion.

Subsection 3(e)(3), like subsection 3(e)(1), provides that nothing in subsection (a) shall prohibit a BOC from providing commercial mobile services. Subsection 3(e)(4) addresses a concern that the intersection of the long distance prohibition in the consent decree, and the permission to enter the information services business as of July 24, 1991, has created unnecessary inefficiencies. For instance, it would be very inefficient for a BOC to have one computer in each local exchange transport area to provide stock quotes or sports scores, for example, or voice-mail. Instead, a BOC should be permitted to set up a central computer to engage in this sort of activity. Accordingly, subsection 3(e)(4) permits a BOC to offer a service that permits this sort of long distance transmitting or receiving of similar information. Under subsection 3(e)(4), a BOC could provide a service that permits a customer located in one exchange area to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another exchange area.

It is the intent of the Committee that subsection 3(e)(4) encompass alarm monitoring service sand that immediate incidental long distance relief be granted for the provision of such services. Thus, to the extent that long distance service is incidentally used in the provision of alarm monitoring services, a BOC would not be required to seek a waiver to provide long distance service in conjunction with the monitoring service.

Subsection 3(e)(5) makes it clear that a Bell company shall be permitted to provide signaling integral to the internal operation of the network, including Signaling System 7, to another local exchange carrier. It would also allow interLATA requires to and responses from centralized databases in support of the exchange and exchange access functions. Subsection 3(e)(6) clarifies that such signaling shall not be deemed a prohibited interexchange service. Accordingly, under this provision, a Bell operating company may provide interexchange carriers access to its signaling system at centralized locations rather than having to provide access in every LATA. These provisions will make signaling systems less expensive and more efficient.

Electronic publishing

Section 4 concerns electronic publishing and is essentially the same language that was contained in last year's House-passed bill, H.R. 3626. Specifically, it states that until June 30, 2000, the BOCs may provide electronic publishing services over their own lines only if such services are provided through a separate affiliate or through a joint venture with an electronic publisher, like a newspaper. BOCs who are already in the electronic publishing business will have one year to come into compliance with section 4.

Subsections 4(a)–(k) set forth at length the various safeguards with which a separated affiliate or joint venture of a BOC must comply to provide electronic publishing over the BOC's lines. Subsections 4(n) and (o) provide for a private right of action to enforce the provisions of section 4 with nationwide service of subpoenas.

Two provisions of the definitions in subsection 4(p) merit attention. First, subsection 4(p)(3) defines the term "basic telephone service" to mean any wireline telephone exchange service or wireline telephone exchange facility provided by a Bell operating company in a telephone exchange area, with exceptions for competitive wirelines telephone exchange service provided on January 1, 1984 and a commercial mobile service provided by an affiliate that is required by the FCC to be a corporate entity separate from the Bell operating company.

Because "telephone exchange service," as defined in section 153(r) of the Communications Act, refers only to an "intercommunicating service" that is provided within the telephone exchange for an exchange service charge, i.e., plain old telephone service, the term "telephone exchange facility" has also been included within the definition of "basic telephone service" to ensure that the bill's definition of "electronic publishing" applies to all content-based information services provided by a Bell company using any part of its monopoly local exchange network, including advanced wireline digital services.

Second, subsection 4(p)(6) defines "electronic publishing" to mean the dissemination, provision, publication, or sale to an unaffiliated entity or person, using a BOC's basis telephone service, of any news; entertainment (other than interactive games); business, financial, legal, consumer, or credit material; editorials; columns; sports reporting; features; advertising; photos or images; archival or research material; legal notices or public records; scientific, educational instructional, technical, professional, trade, or other literary materials; or other like or similar information. This language is intended to embrace all content-based information services generally thought of as "electronic publishing," regardless of the form or subject matter of any particular offering. Subsection 4(p)(6) explicitly excludes from the definition of "electronic publishing," however, various specified network services, as well as full motion video entertainment on demand, and video programming as defined in section 602 of the Communications Act.

Definition of "affiliates"

The definition of a "Bell operating company," subsection 5(5), includes "affiliates" of the company, subsection 5(5)(C). Thus, if a company is an "affiliate" of a Bill operating company, the affiliate is subject to the same restrictions as the Bell operating company itself.

Subsection 5(1) of H.R. 1528 defines the term "affiliate" to mean "a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person." The definition further notes that for purposes of this definition, own refers to owning an equity interest of more than 50 percent.

During consideration of the bill, concerns were expressed that this language would allow a Bell operating company to own as much as 49% of another entity and then conduct prohibited activities through that entity. Ownership and control are different standards under the definition. Although ownership is specifically defined, control is not. However, the Committee expects that a meaning similar to that set forth in subsection 4(p)(5) of the bill will be applied to this term and that ownership interests of substantially less than 50% could constitute control depending on the circumstances.

Effects on other laws

Supersession of the MFJ

H.R. 1528 supersedes the following sections of the MFJ: Section II(C), relating to the deadline for procedures for equal access compliance; Section II(D), relating to the line of business restrictions; Section VIII(A), relating to the manufacturing restrictions; Section VIII(C), relating to the standard for entry into the interexchange market; Section VIII(D), relating to the prohibition on entry into electronic publishing; Section VIII(H), relating to debt ratios at the time of transfer; Section VIII(J), relating to the prohibition on implementation of the plan of reorganization before court approval. Sections II(C), VIII(H), and VIII(J) have already been fulfilled and are now obsolete. The procedures set out in H.R. 1528 will replace the remainder of these sections. See *Plaut* v. *Spendthrift Farm Inc.*, 115 S.Ct. 1447, 1459–60 (1995) (legislation may alter the prospective effect of injunctions entered by Article III courts).

GTE consent decree

The GTE consent decree involves issues that are different from the MFJ. GTE serves less than three percent of America's urban markets. Its market profile consists of widely dispersed small- and medium-sized cities and suburban and rural territory. On the other hand, the BOCs are regions of contiguous states which together serve almost all of the large population centers in the country.

GTE Corporation is not subject to the consent decree (i.e., the MFJ) that resolved the AT&T antitrust case, broke up the Bell system, and imposed the line of business restrictions on the BOCs. Therefore, GTE should not be subject to conditions arising from the MFJ.

The conditions leading to the GTE consent decree—the acquisition of the Sprint and Spacenet assets—are no longer present. Nonetheless, the GTE consent decree's separate subsidiary requirements remain in effect. These requirements prevent GTE from becoming an effective competitor in the Long distance market because they prevent GTE from establishing joint marketing and other efficient operations. Removing these restrictions will bring another viable competitor to the long distance market.

Thus, GTE should be relieved from its consent decree restrictions and allowed to compete like other non-BOC local carriers. Subsection 6(b) of H.R. 1528 achieves this result by superseding the GTE consent decree prospectively.

State law

H.R. 1528 does not preempt any federal, state, or local law unless the act expressly so provides. H.R. 152 8 expressly provides that state and local law are preempted to the extent that those laws would impair or prevent the operation of the Act. Some state tax officials have expressed the concern that this provision of H.R. 1528 might be construed to preempt state tax laws. However, H.R. 1528 is not intended to preempt any state or local tax law.

COMMITTEE CONSIDERATION

On May 18, 1995, the full Committee met in open session and ordered reported the bill H.R. 1528, as amended, by a vote of 29 to 1, a quorum being present.

VOTE OF THE COMMITTEE

The following roll call took place during Committee deliberations on H.R. 1528 (May 18, 1995).

1. The motion to favorably report H.R. 1528, as amended, to the House of Representatives. The motion was agreed to by a roll call vote of 29–1.

AYES	NAYS
Mr. Hyde	Mr. Boucher
Mr. Moorhead	
Mr. Gekas	
Mr. Coble	
Mr. Smith	
Mr. Schiff	
Mr. Gallegly	
Mr. Canady	
Mr. Inglis	
Mr. Goodlatte	
Mr. Buyer	
Mr. Hoke	

Mr. Heineman
Mr. Bryant of Tennessee
Mr. Chabot
Mr. Flanagan
Mr. Barr
Mr. Conyers
Mr. Frank
Mr. Schumer
Mr. Bryant of Texas
Mr. Reed
Mr. Nadler
Mr. Scott
Mr. Watt
Mr. Becerra
Mr. Serrano
Ms. Lofgren
Ms. Jackson-Lee

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1528, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 2, 1995.

Hon. HENRY HYDE,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1528, the antitrust Consent Decree Reform Act of 1995.

Enacting H.R. 1528 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JUNE E. O'NEILL.

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 1528.
2. Bill title: Antitrust Consent Decree Reform Act of 1995.
3. Bill status: As ordered reported by the House Committee on the Judiciary on May 18, 1995.
4. Bill purpose: H.R. 1528 would permit a Bell operating company to apply to the Department of Justice (DOJ) for authority to provide the following communications services: (1) interchange telecommunications services; (2) alarm monitoring services; and (3) manufacture of telecommunications and customer premises equipment. The bill would permit the Bell applicant or any competitor to contest the Attorney General's decision by commencing a civil action in federal court. In addition, H.R. 1528 would make several changes to the current laws regulating electronic publishing.
5. Estimated cost to the Federal Government: Enacting H.R. 1528 would impose additional responsibilities on the Department of Justice and add to the caseload of the federal court system. The estimate costs, assuming appropriation of the necessary funds, are shown in the following table.

[By fiscal year, in millions of dollars]

	1996	1997	1998	1999	2000
Estimated authorizations of appropriations:					
Department of Justice	5	6	6	3	3
The Judiciary	4	4	4	2	2
Total estimated authorization	9	10	10	5	5
Estimated outlays	8	10	10	6	5

The costs of this bill fall within budget function 750.

CBO assumes that the estimated amounts would be appropriated for each fiscal year. Outlay estimates are based on historical outlay rates for similar activities of the DOJ and the Judiciary.

DOJ: H.R. 1528 would require the DOJ to process and review applications and to respond to civil actions. Based on information from the DOJ, CBO estimates that implementing the provisions of the bill would cost the department $5 million to $6 million in each of the first three years, and about $3 million in later years, primarily for personnel costs. We expect the initial costs to be higher because the Bell companies probably would file most of their applications during the first year and because most complaints and challenges would be filed in the first several years before precedents exist.

The Judiciary: Enacting H.R. 1528 would result in more civil actions brought by Bell applicants in federal court. Based on information from the Administrative office of the United States Courts, CBO estimates that costs to the federal judiciary to handle these cases would be about $4 million annually in the first three years, and costs declining to approximately $2 million annually in later years as the number of appeals decreases.

6. Comparison with spending under current law: The requirements set forth in the bill are new and would increase costs to the federal government by the amounts shown in the previous table. In 1995, appropriations for the Department of Justice total about $12 billion, and appropriations for the Judiciary total about $3 billion.

7. Pay-as-you-go considerations: None.

8. Estimated cost to State and local governments: Implementing the provisions of H.R. 1528 could result in increased costs to some states. While the bill would impose no requirements on states, they would have more developments to monitor and coordinate with the DOJ. CBO expects that any additional costs would not significant.

9. Estimate comparison: None.

10. Previous CBO estimate: None.

11. Estimate prepared by: Mark Grabowicz.

12. Estimate approved by: Robert A. Sunshine, for Paul N. Van de Water, Assistant Director for Budget Analysis.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 1(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 1528 will have have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS

Sec. 1. Short title

Section 1 states that H.R. 1528 may be cited as the "Antitrust Consent Decree Reform Act of 1995."

Sec. 2. Authorization for Bell Operating company to enter competitive lines of business

Subsection 2(a)(1) establishes a procedure by which a Bell operating company can apply to the Attorney General to enter the long distance, manufacturing, and alarm monitoring businesses. The application shall describe the nature and scope of the activity, as well as the product, service, and geographic market for which authorization is sought.

Subsection 2(a)(2) provides that on the date of enactment, a Bell company may apply to the Attorney General to enter the long distance and manufacturing markets. They may file a similar application to enter the alarm monitoring services business three years after the date of enactment. Subsection 2(a)(3) provides that within ten days after receipt of an application, the Attorney General must publish it in the Federal Register. Subsection 2(a)(4) provides that the Attorney General shall make available to the public all information submitted by the applicant except for trade secrets and privileged or confidential commercial or financial information.

Subsection 2(b)(1) provides that interested persons will then have 45 days after an application is published to file written comments with the Attorney General. Submitted comments will be publicly available along with materials submitted by the applicant.

Subsection 2(b)(2)(A) provides that the Attorney General will have 180 days from the date of receipt to review the application. If the Attorney General fails to issue a determination on the application within the 180-day period, the application is deemed to be approved.

Subsection 2(b)(2)(B) places the burden of proof on the Attorney General to approve the application unless the Attorney General finds that there is a "dangerous probability" that a Bell company would successfully use its existing market power to substantially impede competition in the new market it seeks to enter. The Attorney General may approve all of part of the application. Subsection 2(b)(2)(C) provides that in any partial approval, the Attorney General must describe with particularity that part (or parts) of the application that are approved.

Subsection 2(b)(3) provides that within ten days after issuing a determination, the Attorney General must publish a brief description of the determination in the Federal Register.

Subsection 2(b)(4) provides that if a petition for review is not timely filed under subsection 2(c)(1), the determination becomes final.

Subsection 2(c)(1)(A) provides that the applicant Bell operating company, or any person would be injured in its business or property as a result of the determination, may file a petition for judicial review of the determination by the United States Court of Appeals for the District of Columbia Circuit. Subsection 2(c)1)(B) provides that the District of Columbia Circuit shall have exclusive jurisdiction to review determinations made under subsection 2(b)(2). Subsection 2(c)(2) provides that the Attorney General shall file a certified copy of the record on which the determination is based, with the Court of Appeals as part of its answer to the petition. Subsection 2(c)(3) provides that all petitions filed with respect to a particular application shall be consolidated.

Subsection 2(c)(4)(A) provides that the Court will review the determination under the Administrative Procedure Act standards set forth in 5 U.S.C. § 706. The Court shall affirm the Attorney General's determination if it finds that the record certified under paragraph (2) provides substantial evidence for the determination. Subsection 2(c)(4)(B) provides that a judgment that results in the approval or reversal of all or part of the authorization, shall describe with particularity what parts of the application are approved or denied.

Sec. 3. Authorization as prerequisite.

Subsection 3(a) prohibits a Bell operating company from entering the long distance, manufacturing, or alarm monitoring businesses unless it is authorized to do so under the procedures set forth in section 2.

Subsections 3(b), 3(c), 3(d), and 3(e), provide for certain exceptions to the general rule set forth in subsection 3(a). No application to the Justice Department is required if the specific terms of these exceptions are met. Subsection 3(b) allows the BOCs to continue to engage in activities that have been approved by the District Court for the District of Columbia under section VII or section VIII(C) of the MFJ, as of the date of enactment or that are subsequently approved by the Court under waivers that are pending before the Court as of the date of enactment.

Subsection 3(c) allows a Bell operating company to continue to provide alarm monitoring services if it was already lawfully providing such services before the date of enactment.

Subsection 3(d) allows the Bell companies to provide long distance telecommunication services with respect to telecommunications that originate in any exchange area outside of their region.

Subsection 3(e) allows the Bell companies to provide certain incidental long distance services relating to providing audio or video programing, out of region cable television services, cellular telephone service, information services, local exchange signaling information, and network signaling information, without applying to thee Attorney General.

Sec. 4. Regulation of electronic publishing

Subsection 4(a) sets forth the basic parameters of the Act's regulation of electronic publishing. A Bell operating company, as defined in subsection 4(p)(1), and any affiliate as defined in subsection 4(p)(2), shall not engage in electronic publishing that is disseminated by that company's or its affiliates' basic telephone service. However, a separated affiliate as defined in subsection 4(p)(11), or electronic publishing joint venture, as defined in subsection 4(p)(7), may provide electronic publishing. Finally, the subsection makes clear that nothing in section 4 shall prohibit a Bell operating company from providing electronic publishing that is not disseminated by means of the company's or any of its affiliates' basic telephone service.

Subsection 4(b) sets forth the requirements for separated affiliates and electronic publishing joint ventures. Separated affiliates and electronic publishing joint ventures are required to maintain separate books, records, and accounts from the Bell operating company. Subsection 4(b)(1). They may not incur debt in a manner that would permit the creditor to have recourse to the assets of the Bell operating company. Subsection 4(b)(2). They must prepare financial statements that are not consolidated with those of the Bell operating company. Subsection 4(b)(3).

After one year from the date of enactment, they may not hire: (A) as corporate officers, sales and marketing management personnel whose responsibilities for the affiliate or joint venture will include the geographic area where the Bell operating company provides basic telephone service, (B) any network operations personnel whose responsibilities would require dealing directly with the Bell operating company, or (C) any person who was employed by the Bell operating company during the previous year. This paragraph does not apply to persons covered by a collective bargaining agreement that gives such persons the right to be employed by an affiliate or joint venture. Subsection 4(b)(4).

Separated affiliates and electronic publishing joint ventures are further required not to provide any wireline telephone exchange service, except through resale, in the area of the Bell operating company with which it is under common ownership or control. Subsection 4(b)(5). They may not use the name, trademarks or service marks of an existing Bell operating company, except when they are or were used in common with the entity that owns or controls the Bell operating company. Subsection 4(b)(6). They must perform an annual compliance review by March 31 of each year and provide a report of any exceptions and corrective action to the Attorney General within 90 days after receiving the review. Subsections 4(b)(7) & (8).

Subsection 4(c) sets forth the requirements for the Bell operating companies with respect to separated affiliates or electronic publishing joint ventures. The Bell operating company may not provide a separated affiliate with any facilities, services, or basic telephone service information that it does not provide to non-affiliates on the same terms and conditions. Subsection 4(c)(1). It must carry out transactions with a separated affiliate in the same manner as it would carry out independent transactions. Subsection 4(c)(2). It must carry out transactions with a separated affiliate involving the transfer of personnel, assets, or anything of value, pursuant to a written contract or publicly available tariff. Subsection 4(c)(3). It must carry out transactions with a separated affiliate in a manner that is auditable, in accordance with generally acceptable auditing standards. Subsection 4(c)(4).

The Bell operating company is further required to value any assets transferred to a separated affiliate at the greater of net book cost or fair market value. Subsection 4(c)(5). It must value any assets transferred to it from the separated affiliate at the lesser of net book cost or fair market value. Subsection 4(c)(6).

The Bell operating company may not provide any debt or equity financing directly or indirectly to a separated affiliate, except for instances where state regulations permit in-arrears payment for tariffed telecommunications services or investment by an affiliate of dividends or profits derived from a Bell operating company. Subsection 4(c)(7). It must comply fully with all applicable State cost allocation and accounting rules. Subsection 4(c)(8). It must have performed, by an independent entity, an annual compliance review by March 31 of each year. After receiving the review, it must file a report of any exceptions and corrective action with the Attorney General within 90 days. Subsections 4(c)(9) and (10).

The Bell operating company must provide all electronic publishers the same type of facilities, services, network access and interconnection, and network information as provided to any other electronic publisher, on the same terms and conditions and at a charge that is no higher on a per unit basis. Subsections 4(c)(11), (12), (13), (14), and (15).

The Bell operating company may not provide anything of value to a separated affiliate without consideration at least equal to the greater of its net book cost or fair market value, except the investment of dividends or profits derived from a Bell company. Subsection 4(c)(16). It may not discriminate in the presentation or provision of any gateway for electronic publishing services or electronic directory of information services. Subsection 4(c)(17). It may not have any directors, officers, or employees in common with a separated affiliate. Subsection 4(c)(18). It may not own any property in common with a separated affiliate. Subsection 4(c)(19).

The Bell operating company may not perform any hiring or training of personnel for a separated affiliate. Subsection 4(c)(20). It may not purchase, install, or maintain any equipment for a separated affiliate, except for telephone service that it provides under contract or tariff. Subsection 4(c)(21). It may not perform any research and development on behalf of a separated affiliate. Subsection 4(c)(22).

Subsection 4(d) requires the Bell operating company to provide customer proprietary network information to electronic publishers on a non-discriminatory basis.

Subsection 4(e) prohibits the Bell operating company, its affiliates, or a separated affiliate from acting in concert with one another to knowingly or willfully evade the requirements of this section.

Subsection 4(f) clarifies that nothing in this section precludes an affiliate from investing dividends derived from a Bell operating company in its separated affiliate.

Subsection 4(g) prohibits the Bell operating company from engaging in any joint marketing with a separated affiliate or with an affiliate that is related to electronic publishing, except as provided in subsection 4(h).

Subsection 4(h) sets forth the joint marketing activities in which a Bell operating company may engage. Under subsection 4(h)(1), the Bell operating company may provide inbound telemarketing or referral services for a separated affiliate or electronic publishing joint venture so long as such services are provided on a non-discriminatory basis to non-affiliated electronic publishers. Under subsection 4(h)(2), the Bell operating company may engage in teaming or business arrangements with a separated affiliate or any other electronic publisher so long as it only provides facilities, services, and basic telephone service information as authorized by this section. The Bell company, however, may not own the teaming or business arrangement.

Under subsection 4(h)(3), the Bell operating company may engage in electronic publishing joint ventures so long as it does not own more than 50 percent direct or indirect equity interest in the joint venture. In the case of small, local electronic publishers, the Attorney General may authorize the Bell operating company to own up to 80% of the joint venture. The Committee intends the term "small, local electronic publishers" to cover electronic publishers serving only communities of 50,000 or less.

Subsection 4(i) places restrictions of transactions between a Bell operating company and any of its affiliates relating to the provision of electronic publishing. Subsection 4(i)(1) requires that any such transactions shall be recorded on the books of each entity, that the transaction shall be auditable, and that the transaction shall be pursuant to publicly available written contracts or tariffs filed with a State.

Subsection 4(i)(2) requires that any transfer of assets from a Bell operating company to an affiliate directly related to the provision of electronic publishing shall be valued at the greater of net book cost or fair market value. It further requires that any transfer of assets from an affiliate to the Bell operating company related to the provision of electronic publishing shall be valued at the lesser of net book cost or fair market value.

Subsection 4(i)(3) prohibits a Bell operating company from providing any facilities, services, or basic telephone service information any facilities, services, or basic telephone service information to an affiliate that are not made available to unaffiliated companies on the same terms and conditions.

Subsection 4(j) applies the requirements of subsection 4(i) to transactions between affiliates and separated affiliates.

Subsection 4(k) prohibits a Bell operating company from having an officer, employees, property or facilities in common with any electronic publishing entity. This subsection also prohibits a Bell operating company employee from serving as a director of any electronic publishing entity, and prohibits Bell operating company from carrying out any marketing or sales, or any hiring of personnel, purchasing, or production, for any electronic publishing entity. A Bell operating company must provide to any non-affiliated electronic publisher any facilities, services, or basic telephone information on the same terms and conditions under which it provides them to an affiliate.

Subsection 4(l) allows any Bell operating company or affiliate already offering an electronic publishing service on the date of enactment, one year to comply with the requirements of this section.

Subsection 4(m) provides that this section shall not apply to conduct occurring after June 30, 2000.

Subsection 4(n) provides a private right of action in United States District Court for any person claiming that any act or practice of a Bell operating company, affiliate, or separated affiliate constitutes a violation of this section.

Subsection 4(o) provides that in action commenced under this section, subpoenas may be served nationwide.

Subsection 4(p) provides definitions for purposes of section 4. The definitions in subsection 4(p) apply to Section 4. A separate set of definitions that apply to the other sections of this bill is set forth in Section 5.

Subsection 4(p)(1) defines the term "Bell operating company" to include those companies defined as Bell operating companies in the MFJ. See *AT&T,* 552 F. Supp. at 228, 232. The definition also includes entities owned or controlled by those companies or successors or assigns of those companies, but it does not include electronic publishing joint ventures owned by such corporation or entity.

Subsection 4(p)(2) defines the term "affiliate" to mean any entity that, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control with a Bell operating company, except for a separated affiliate.

Subsection 4(p)(3) defines the term "basic telephone service" to mean any wireline telephone exchange service or wireline telephone exchange facility provided by a Bell operating company in a telephone exchange area, except a competitive wireline telephone exchange service in an area where another entity provides a competing wireline telephone exchange service that was provided on January 1, 1994, and commercial mobile service provided by a separate affiliate.

Subsection 4(p)(4) defines the term "basic telephone service information" to mean network and customer information of a Bell operating company and other information acquired by it as a result of providing basic telephone service.

Subsection (4)(p)(5) defines the term "control" to mean the possession of the power to direct or cause the direction of the management and policies of a person, through ownership of voting securities, by contrast, or otherwise.

Subsection 4(p)(6) defines the term "electronic publishing" to mean the dissemination, provision, publication, or sale to an unaffiliated entity or person of various listed categories of information using a Bell operating company's basic telephone service. The term also excludes various listed categories of information transmission from the definition.

Subsection 4(p)(7) defines the term "electronic publishing joint venture" to mean a joint venture owned by a Bell operating company or an affiliate that provides electronic publishing by means of the Bell operating company's or an affiliate's basic telephone service.

Subsection 4(p)(8) defines the term "entity" to mean any organization, including corporations, partnerships, sole proprietorships, associations, and joint ventures.

Subsection 4(p)(9) defines the term "inbound telemarketing" to mean the marketing of property, goods, or services by telephone to a customer or potential customer who initiates the call.

Subsection 4(p)(10) defines the term "own" to mean having more than a 10 percent equity interest in an entity or having the right to more than 10 percent of the gross revenues of the entity.

Subsection 4(p)(11) defines the term "separated affiliate" to mean a corporation under common ownership or control with a Bell operating company that does not own or control a Bell operating company, that is not owned or controlled by the Bell operating company, and that provides electronic publishing by means of the Bell operating company's or any of its affiliates' basic telephone service.

Sec. 5. Definitions

Section 5 defines various terms used in all sections of the bill except section 4. As discussed above, section 4 contains a separate list of definitions applicable only to that section.

Subsection 5(1) defines the term "affiliate" to mean a person that, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this definition, to own refers to owning more than a 50 percent equity interest.

Subsection 5(2) defines the term "alarm monitoring service" to mean a service that uses a devise at a home, business or other fixed premises to receive or transmit signals regarding a possible threat (burglary, fire, vandalism, etc.) to the premises, but does not include medical monitoring device services.

Subsection 5(3) defines the term "antitrust laws" as that term is defined in the first section of the Clayton Act, 15 U.S.C. § 12(a), but it also includes the Robinson-Patman Act and § 5 of the Federal Trade Commission Act insofar as that section applies to unfair methods of competition.

Subsection 5(4) defines the term "audio programming" to mean programming provided by, or comparable to, programming provided by a radio broadcast station.

Subsection 5(5) defines the term "Bell operating company" as the 20 existing Bell operating companies plus their successors, assigns, or affiliates.

Subsection 5(6) defines the term "cable system" as that term is defined in section 602(7) of the Communications Act of 1934, 47 U.S.C. § 522(7).

Subsection 5(7) defines the term "carrier" as that term is defined in section 3 of the Communications Act of 1934, 47 U.S.C. § 153.

Subsection 5(8) defines the term "commercial mobile services" as that term is defined in section 332(d) of the Communications Act of 1934, 47 U.S.C. § 332(d).

Subsection 5(9) defines the term "customer premises equipment" to mean equipment used on the premises of a person to originate, route, or terminate the telecommunications, including software integral to such equipment.

Subsection 5(10) defines the term "exchange access" to mane exchange services provided to originate or terminate interchange telecommunications.

Subsection 5(11) defines the term "exchange area" to mean a contiguous geographic area established by a Bell operating company such that no exchange area contains points within more than one metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the MFJ before the date of enactment.

Subsection 5(12) defines the term "exchange service" to mean a telecommunication service provided within an exchange area.

Subsection 5(13) defines the term "information" to mean knowledge or intelligence represented by any form of writing signs, signals, pictures, sounds, or other symbols, except as provided in section 5(17) defining the term "other programming services."

Subsection 5(14) defines the term "interchange telecommunications" to mean telecommunications between a point within an exchange area and a point outside of that exchange area.

Subsection 5(15) defines the term "manufacture" as that term is defined in the MFJ. See *United States* v. *Western Electric Co.*, 675 F.Supp. 655 (D.D.C. 1987), aff'd, 894 F.2d 1387 (D.C. Cir. 1990).

Subsection 5(16) defines the term "Modification of Final Judgment" to mean the order entered August 24, 1982 in the antitrust action styled *United States* v. *Western Electric Co.*, Civil Action No. 82–0192, in the United States District Court for the District of Columbia, and all judgments and orders entered in that action on or after August 24, 1982.

Subsection 5(17) defines the term "other programming services" to mean information (other than audio programming or video programming) that the person who offers a video programming services makes available to all subscribers generally. For purposes of this definition, the terms "information" and "makes available to all subscribers generally" have the same meaning as they do under section 602(13) of the Communications Act of 1934, 47 U.S.C. § 522(13).

Subsection 5(18) defines the term "person" as that term is defined in subsection (a) of the first section of the Clayton Act, 15 U.S.C. § 12(a).

Subsection 5(19) defines the term "State" to mean the several states, the District of Columbia, Puerto Rico, the Northern Mariana Islands, Micronesia, the Marshall Islands, Palau, or any other territory or possession of the United States.

Subsection 5(20) defines the term "telecommunications" to mean the transmission of information between points by electromagnetic means.

Subsection 5(21) defines the term "telecommunications equipment" to mean equipment, other than customer premises equipment, used by a carrier to provide a telecommunications service.

Subsection 5(22) defines the term "telecommunications service" to mean the offering for hire of transmission facilities or telecommunications by means of such facilities.

Subsection 5(23) defines the term "transmission facilities" to mean equipment, other than customer premises equipment, that transmits or directly supports transmission of information by electromagnetic means. It includes wire, cable, microwave, satellite and fiber-optics.

Subsection 5(24) defines the term "video programming" as that term is defined in section 602(19) of the Communications Act of 1934, 47 U.S.C. § 522(19).

Sec. 6. Relationship to other laws.

Subsection 6(a) provides that the following parts of the MFJ are superseded: Section II(C), relating to the deadline for procedures for equal access compliance; Section II(D), relating to the line of business restrictions; Section VIII(A), relating to the manufacturing restrictions; Section VIII(C) relating to the standard for entry into the interexchange market; Section VIII(D), Relating to the prohibition on entry into electronic publishing; Section VIII(H), relating to debt ratios at the time of transfer; Section VIII(J), relating to the prohibition on implementation of the plan of reorganization before court approval.

Subsection 6(b) provides that this Act supersedes the separate consent decree entered December 21, 1984 in the Action styled *United States* v. *GTE Corp.*, Civil Action No. 83–1298, in the United States District Court for the District of Columbia.

Subsection 6(c) provides that nothing in this Act shall be construed to modify, impair, or supersede the applicability of the antitrust laws.

Subsection 6(d)(1) provides that the Act shall not be construed to modify, impair, or supersede any Federal, state, or local law unless the Act expressly so provides. Subsection 6(d)(2) provides that the Act shall supersede State and local law, but only to the extent that such law would impair or prevent the operation or purposes of this Act.

ADDITIONAL VIEWS

We were very pleased when Chairman Hyde took the initiative in introducing legislation this Congress relating to the Justice Department's role in reviewing Bell entry into long distance, manufacturing, and alarm services. We hoped that H.R. 1528 would provide the opportunity for a consensus and bipartisan approach to the issue of whether and how to supersede the AT&T Consent Decree (also known as the "MFJ").[1] While we had a number of concerns with the text of H.R. 1528 as originally introduced, we were pleased to be able to support a bipartisan compromise developed by Chairman Hyde and Ranking Member Conyers concerning the issue of the entry test, which has been the subject of intense jurisdictional interest by this Committee on a bipartisan basis for the last three Congresses. Specifically, under the compromise, entry would be permitted in a given market unless the Attorney General finds there is a "dangerous probability such company or its affiliates would successfully use market power to substantially impede competition."

Although this did not settle all of the concerns we had with the bill, it responded to what we considered to be the most important issue.[2] In our view, the legislation—as amended—offered a genuine prospect of insuring that the Justice Department would continue to play a central role in safeguarding competition in the crucial telecommunications industry. In particular, we believed that granting the Department of Justice an appropriate role would help to make sure the Bells do not use their control of the local exchange market to impair competition in the long distance, manufacturing, and alarm services markets, while at the same time allowing new competitors—including the Bells—to enter these markets on an orderly basis.

History has established that the Justice Department is in the best position to safeguard competition in the telecommunications marketplace. It was only after regulation was found to be unable to rein in the worst of the Bell System's anticompetitive practices that the Justice Department was forced to bring antitrust lawsuits

[1] The MFJ, which was entered in 1982 and became effective in 1984, is the largest antitrust consent decree in history and broke up the Bell System into AT&T (which retained the long distance and manufacturing lines of business) and seven Regional Bell Operating Companies (which retain the local service monopolies), known as "BOCs," "Bells" or "Baby Bells." Because of concern that the Bells could use their control over local service to unfairly impede competition, they were prohibited from entering into three competitive lines of business: long distance, manufacturing, and information services. Pursuant to Section VIII(C) of the MFJ, a particular restriction could only be lifted if a Bell could establish to the court that there was "no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." Subsequent to the entry of the MFJ, the courts have lifted the information services restriction.

[2] At the Committee markup, Ranking Member Conyers noted that "as a result of [the Hyde-Conyers compromise] there are other considerations, important ones, that we will still attempt to negotiate before this bill goes to the Floor."

in 1913 and 1949.[3] In 1974, after technological developments made it feasible for companies to compete with the Bell System in the areas of long distance and manufacturing and attempts to provide Bell System competitors with a "level paying field" proved to be futile, the Justice Department brought the third antitrust suit against the Bell System, which culminated in the 1982 MFJ. The MFJ has, in turn, spawned a virtual explosion in innovation and cost savings in the long distance and manufacturing sectors, and allowed thousands of new business to develop and flourish.[4]

Unfortunately, it appears that in connection with efforts to combine H.R. 1528 with H.R. 1555 (omnibus telecommunications legislation ordered reported by the Commerce Committee), the focus has moved away from ensuring that the Justice Department will play a central and meaningful role in reviewing Bell entry into long distance, manufacturing, and alarm services. If this is the case, it would severely jeopardize the competitive telecommunications industry from which American businesses and consumers have benefited over the last decade.

Of particular concern are reports of efforts to relegate the Justice Department to a "consultative role" to the Federal Communications Commission. Experience has taught us that a mere consulting role for the Department of Justice does not protect competition. The nation tried the idea of giving the Department such a role in the airline industry when we replaced heavy regulation with competition, as we now seek to do in telecommunications. That consulting role did not work to protect competition—the result was higher airline prices and less choice for many American consumers.[5]

Today's Committee views, and previous Committee Reports clearly highlight, that for many years the Judiciary Committee has had a significant, if not the lead, jurisdictional role in reviewing legislation which would supersede the MFJ. In 1980, the Judiciary Committee's adverse report on H.R. 6121 sounded the death knell for efforts to derail DOJ's antitrust action against the Bell System. Legislation introduced by Judiciary Chairman Brooks in 1992 to codify the competitive principles of the MFJ, was referred to and dealt with by the Judiciary Committee on an exclusive basis.[6] In 1993, the legislation was combined with provisions amending the Communications Act of 1934 in a bill which the Judiciary Committee had a co-equal role.[7]

It is our hope that as telecommunications legislation is considered by the full House of Representatives, the Justice Department

[3] The House Judiciary Committee Report on H.R. 3626 from the 103d Congress provides a detailed review of the MFJ and the history of Justice Department antitrust enforcement in the area of telecommunications. See H.R. Rep. No. 559, 103d Cong. 2d Sess., pt. 2 (1994). H.R. 3626 was approved by the House of Representatives on June 28, 1994 by a vote of 423 to 5, but was not considered in the Senate.

[4] Id. at 55.

[5] From 1985 to 1989, during the transition from airline regulation to competition, the Department of Transportation had the authority to approve airline mergers, subject to advice from DOJ. See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978). In 1986, DOT approved two mergers over DOJ's vigorous objections—Northwest Airlines acquisition of its main Minneapolis rival, Republic and TWA's acquisition of its main St. Louis competitor, Ozark. And as Justice feared, the mergers resulted in higher fares and less choice for travelers. See U.S. General Accounting Office, Airline Competition: Fare and Service Changes at St. Louis since the TWA Ozark Merger, briefing report to the Honorable John C. Danforth, Committee on Commerce, Science, and Transportation, U.S. Senate (September, 1988).

[6] See H.R. 5096. 102d Cong., 2d Sess. (1992).

[7] See H.R. 3626. 103d Cong., 1st Sess. (1993).

will be given a central and meaningful role in reviewing Bell entry into long distance, manufacturing, and alarm services.[8] If the Department is not given adequate authority to safeguard competition, the most likely result will be a return to monopolistic abuses, the costs of which will ultimately be borne by telephone consumers. However, if the Department is granted a meaningful role, we believe the nation will be able to continue to build on the competitive successes of the MFJ and maintain its world leadership in telecommunications.

JOHN CONYERS, JR.
HOWARD L. BERMAN.
JERROLD NADLER.
BOBBY SCOTT.
MELVIN L. WATT.
SHEILA JACKSON LEE.

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[8] Once entry into long distance, manufacturing and alarm services is achieved by the Bells, the antitrust laws will simply apply in the same manner they do to all other industries.

TELECOMMUNICATIONS: THE ROLE OF THE DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

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